

# **EXHIBIT B**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 14-11108-sh1

- - - - -x

In the Matter of:

GENCO SHIPPING & TRADING LIMITED, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

June 3, 2014

2:45 PM

B E F O R E:

HON. SEAN H. LANE

U.S. BANKRUPTCY JUDGE

1

2 Status Conference re: Discovery

3

4 Hearing re: Rothschild Retention

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20 Transcribed by: Dena Page

21 eScribers, LLC

22 700 West 192nd Street, Suite #607

23 New York, NY 10040

24 (973) 406-2250

25 operations@escribers.net

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S :

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Attorneys for Debtors  
1177 Avenue of the Americas  
New York, NY 10036

BY: ADAM C. ROGOFF, ESQ.  
P. BRADLEY O'NEILL, ESQ.

SIDLEY AUSTIN LLP

Attorneys for Official Committee of Equity Holders  
787 7th Avenue  
New York, NY 10019

BY: MICHAEL G. BURKE, ESQ.  
STEVEN M. BIERMAN, ESQ.  
LARRY J. NYHAN, ESQ.  
BENJAMIN NAGIN, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MILBANK, TWEED, HADLEY & MCCLOY LLP  
Attorneys for Wilmington Trust, N.A. as  
agent for the 2007 secured loan facility  
One Chase Manhattan Plaza  
New York, NY 10005  
BY: DENNIS F. DUNNE, ESQ.  
SAMUEL A. KHALIL, ESQ.

MILBANK, TWEED, HADLEY & MCCLOY LLP  
Attorneys for Wilmington Trust, N.A. as  
agent for the 2007 secured loan facility  
1850 K Street, NW  
Washington, DC 20006  
BY: AARON RENENGER, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP  
Attorneys for Credit Agricole Corporate and Investment  
Bank and Deutsche Bank AG, Agents under 2010  
Pre-Petition Secured Credit Facilities  
1285 Avenue of the Americas  
New York, NY 10019

BY: ELIZABETH R. MCCOLM, ESQ. (TELEPHONICALLY)

DEBEVOISE & PLIMPTON LLP  
Attorneys for Rothschild Inc.  
919 Third Avenue  
New York, NY 10022

BY: RICHARD F. HAHN, ESQ.  
DEREK P. ALEXANDER, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ORRICK, HERRINGTON & SUTCLIFFE LLP  
  
Attorneys for Credit Agricole Corporate and  
Investment Bank  
  
Columbia Center  
1152 15th Street, N.W.  
Washington, DC 20005  
  
BY: DOUGLAS S. MINTZ, ESQ.

ORRICK, HERRINGTON & SUTCLIFFE LLP  
  
Attorneys for Credit Agricole Corporate and  
Investment Bank  
  
51 West 52nd Street  
New York, NY 10019  
  
BY: PETER J. AMEND, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

AKIN GUMP STRAUSS HAUER & FELD LLP

Attorneys for Informal Noteholder Group

One Bryant Park

New York, NY 10036

BY: SEAN E. O'DONNELL, ESQ.

MICHAEL S. STAMER, ESQ.

AKIN GUMP STRAUSS HAUER & FELD LLP

Attorneys for Informal Noteholder Group

1700 Pacific Avenue

Suite 400

Dallas, TX 75201

BY: SARAH LINK SCHULTZ, ESQ.



GENCO SHIPPING & TRADING LIMITED, ET AL.

8

1 P R O C E E D I N G S

2 THE COURT: -- a continued hearing on a renewed  
3 application as to the Rothschild retention. We're also here  
4 for discovery, continued discussions. I confess, I can't  
5 decide which is more exciting, but I think, given the timing  
6 concerns, I think it probably makes to start with the  
7 Rothschild retention.

8 MR. O'NEILL: I'd like to give you a brief report on  
9 Rothschild, Your Honor.

10 THE COURT: Sure.

11 MR. O'NEILL: And then we may -- and the parties may  
12 suggest that we reverse the order of your consideration of  
13 those two issues.

14 THE COURT: That's fine.

15 MR. O'NEILL: After the oral motion yesterday, the RSA  
16 parties got together and made a collective proposal to the  
17 equity committee to amicably resolve their objections to the  
18 Rothschild retention. The equity committee is considering that  
19 proposal. We have not yet received a counter or a response,  
20 but our understanding is the matter is percolating and likely  
21 will percolate during the course of this hearing, and it may be  
22 profitable, therefore, to take up discovery matters and let  
23 that --

24 THE COURT: That's fine.

25

GENCO SHIPPING & TRADING LIMITED, ET AL.

9

1 MR. O'NEILL: -- proceed in the hope that maybe we  
2 have a resolution by the end.

3 THE COURT: Let's do that. And I will tell you that I  
4 am not anxious to issue a ruling on the issue. I understand  
5 what happened and the order that was entered in the case in  
6 Delaware. That's where all parties agreed. But it's another  
7 thing for a court to start issuing a ruling about what one side  
8 characterizes as a fee paid for just showing up while the other  
9 side characterized it as something where it needs to be paid or  
10 they're not going to get a financial advisor. As reading the  
11 transcript that was provided to me in the discovery context  
12 from another Delaware case, it's pretty clear everything is  
13 precedential, and there's some potentially thorny aspects of  
14 ruling on that, per se. So I appreciate the parties' continued  
15 discussions.

16 And so I'm happy to segue to the discovery issue where  
17 I understand, based on the letters, that there has been some  
18 progress on a number of fronts, so if you want to start with  
19 that.

20 MR. O'NEILL: I think my function, here, is  
21 introductory. I think there's principally one issue to be  
22 addressed to you today, and that's the issue that's outlined in  
23 the letters. But maybe to begin, I'll give you a little  
24 consensus on a couple of items.

25 First, after yesterday's hearing, the debtor took

GENCO SHIPPING & TRADING LIMITED, ET AL.

10

1 stock of what had occurred and we withdrew our objections to  
2 the two depositions that Your Honor considered yesterday, and  
3 so those depositions are now in the schedule, and from our --  
4 there may still be some dickering about dates; I certainly hope  
5 not, but from the debtors' perspective, we have eight  
6 depositions on the schedule of debtor or debtors' expert --

7 THE COURT: Right.

8 MR. O'NEILL: -- or professional witness.

9 And then the second item is, at the request of the  
10 equity committee, the debtors have consented to the equity  
11 committee exceeding the page limits in Your Honor's case  
12 management order on its objection to confirmation, and the  
13 agreed length would be fifty pages.

14 THE COURT: All right, and I assume that you've worked  
15 out whatever your reply is, in terms of the same level of  
16 collegiality.

17 MR. O'NEILL: We did, and there's one other issue  
18 which we may present to you, which is after the schedule  
19 adjustments yesterday, we actually ended up losing half a day  
20 on our response period. In other words, they got an additional  
21 day and we got only an additional half day. But I'll consult  
22 with them and --

23 THE COURT: Am I right? I thought I was giving half a  
24 day. I thought the due date for the objection was Thursday,  
25 and I thought I moved it to Friday at noon.

GENCO SHIPPING & TRADING LIMITED, ET AL.

11

1 MR. O'NEILL: I think they moved from Thursday noon to  
2 Friday noon, and we went from --

3 THE COURT: Oh, I see. All right, all right.

4 MR. O'NEILL: That's how it worked. Now, we can --  
5 we'll attempt to work it out and come up with something.

6 THE COURT: Yeah, I mean, I'm trying to be evenhanded,  
7 so I think --

8 MR. O'NEILL: I know it was unintentional.

9 THE COURT: -- I thought I was moving --

10 MR. O'NEILL: Yeah.

11 THE COURT: -- although I was incorrect about it,  
12 everything a half a day. But if I moved theirs a day, I'll  
13 move yours a day.

14 MR. O'NEILL: Okay.

15 THE COURT: It should be fair to everybody.

16 MR. O'NEILL: Thank you. And now I'll turn it over to  
17 Mr. O'Donnell.

18 THE COURT: All right, well, let me hear from the -- I  
19 see the committee counsel rising. So anything briefly before  
20 we get to discovery?

21 MR. BIERMAN: On the discovery issue -- may the  
22 committee proceed first, Your Honor?

23 THE COURT: Yeah, I've read everything. Maybe I'll do  
24 the recap, and then nobody has to fight for the podium.

25 I understand that basically, as to the debtor, things

GENCO SHIPPING & TRADING LIMITED, ET AL.

12

1 are resolved and you've reached an agreement about the  
2 depositions.

3 As to what I'll say is everybody else, I understand  
4 your letter to be saying that you'll limit yourself to six  
5 depositions, and that's the context in which this discussion is  
6 happening about the scope of those depositions, in terms of the  
7 evidence to be adduced. Am I right on that?

8 MR. BIERMAN: That's right, Your Honor.

9 THE COURT: Okay.

10 MR. BIERMAN: Might I briefly supplement that?

11 THE COURT: Sure.

12 MR. BIERMAN: May I do it from here? Would you like  
13 me to --

14 THE COURT: Anywhere, as long as you're on a  
15 microphone so you're heard --

16 MR. BIERMAN: Okay.

17 THE COURT: -- and you can be counted in the  
18 transcript, that's the most important thing.

19 MR. BIERMAN: Thank you, Your Honor. Steven Bierman  
20 from Sidley Austin, proposed counsel for the official equity  
21 committee.

22 Your Honor's exactly right. We have made progress,  
23 and we have limited the requests that we were discussing with  
24 the Court yesterday. I think the propositions we want to leave  
25 Your Honor with this afternoon are very simple and only a few.

1 One is that we are not looking to adduce opinion testimony;  
2 we're not looking to sneak in, somehow, opinion testimony  
3 through lay witnesses. What we seek is factual evidence of  
4 who, what, when, where at the time in making decisions and in  
5 interacting with the debtors. That's one proposition.

6 The second is that we believe we've made a showing in  
7 the letter that we submitted to Your Honor a number of ways, by  
8 example at least, in which the evidence that we seek to adduce,  
9 which is narrowcast in its focus, is directly relevant and  
10 probative of ultimate issues in the case. And we've laid those  
11 out, and Your Honor's read the letter, so I won't presume to  
12 repeat them.

13 I will say this, though, Your Honor, and that is that  
14 as much as we are telescoping down to the smallest scope  
15 possible discovery, in terms of number of depositions, length  
16 of depositions, scope of inquiry, it is still discovery in aid  
17 of ultimate fact-finding and ultimate decision-making. And we  
18 believe that apart from the relevance that we've set forth in  
19 the half dozen or so bullets in our letter that this is  
20 discovery calculated to lead to the discovery of admissible  
21 evidence. There are any number of scenarios in which we  
22 believe Your Honor will want to hear and see the evidence that  
23 we will adduce at the confirmation hearing.

24 And the last thing I'd leave Your Honor with is in  
25 connection with Mr. O'Donnell's submission from Akin Gump, it

1 referred to the Dolan case before Judge Shannon in Delaware.  
2 And I've appeared before Judge Shannon; I know that Judge  
3 Shannon, as well as judges, generally, takes cases as he finds  
4 them, and the circumstances of each case, of course, matter.

5 It's interesting, when one looks at the transcript of  
6 the hearing before Judge Shannon, which Mr. O'Donnell helpfully  
7 attached, that the issue that he was raising at the time before  
8 the court was not one of the relevance of this information, but  
9 rather one of burden, and the weighing of relevance versus  
10 burden. And notably, the discovery requests that Mr. O'Donnell  
11 was complaining about -- and he may have been appropriately  
12 complaining about, for all I know, because I know what I read  
13 on the subway on the way down to court, Your Honor -- requests  
14 all documents -- the request in that case was "all documents  
15 concerning the plan". That's not what we're doing.

16 THE COURT: No, I'm aware. I read it, and each case  
17 that everybody cites has to be understood in the context of its  
18 facts. So I'm mindful of the factual --

19 MR. BIERMAN: Thank you.

20 THE COURT: -- distinctions between all of the cases  
21 cited.

22 MR. BIERMAN: Thank you, and so the bottom line for us  
23 is that we have really tried hard, I think as you heard from  
24 everybody, everyone's trying hard in trying circumstances.  
25 We've tried hard to be narrow and to be limited. We think the

GENCO SHIPPING & TRADING LIMITED, ET AL.

15

1 discovery we've outlined is probative and, in any event,  
2 calculated to lead to discovery of admissible evidence. And I  
3 will note that at least one of the depositions, the Kayne  
4 Anderson deposition, is already scheduled and so Your Honor,  
5 we're already on our way to accomplishing this very limited  
6 goal.

7 THE COURT: All right.

8 MR. BIERMAN: Thank you.

9 THE COURT: Thank you.

10 MR. O'DONNELL: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. O'DONNELL: May it please the Court, Sean  
13 O'Donnell of Akin Gump on behalf of the noteholders.

14 Your Honor, first of all, we took to heart the request  
15 by the Court yesterday -- seems so long ago -- when you asked  
16 for three cases that related to the relevancy of an internal  
17 analysis by creditors or lenders as it relates to a debtor's  
18 valuation in the context of a confirmation hearing.

19 We did not understand the Court's request that you  
20 were looking for arguments on the merit, nor did we think you  
21 were interested in more e-mails that were sent over to the  
22 equity committee.

23 THE COURT: No, I mean, I got it. I have what I have,  
24 and I asked for what I asked for. And again, this is why I  
25 should've made myself more clear that when I say I want three



GENCO SHIPPING & TRADING LIMITED, ET AL.

16

1 cases, I actually didn't want a letter; I just wanted three  
2 cases, cites, and if you're so inclined, a PDF of the cases.  
3 But I'll be more clear next time. But that's fine; it is what  
4 it is. I've read everything that -- I mean, I selectively read  
5 some of the longer opinions, but I think I read the relevant  
6 parts.

7 MR. O'DONNELL: Thank you, Your Honor. And just  
8 because of how we understood the Court's instruction from  
9 yesterday, obviously, we didn't respond to the letter from  
10 Friday which also attached e-mails and made arguments on the  
11 merits. I shared the same library as Mr. Bierman; I had the  
12 pleasure of reading on the subway down here, just now, and got  
13 to take a look at the exhibits that were annexed -- Exhibit A,  
14 I believe it was -- that were annexed to their letter.

15 And at this point, I do just very briefly -- all of  
16 thirty seconds -- feel compelled to respond, at least in part,  
17 to the e-mails that they keep pointing to. So the e-mails are  
18 from Kayne Anderson who are no longer members of the noteholder  
19 group, and the e-mails of late, they're dated -- if I have it  
20 written down correctly -- December 16th and December 17th,  
21 2013. And just to put it in context, Your Honor, it was  
22 approximately two weeks later, December 31st, 2013 that the RSA  
23 was signed.

24 The reason why those dates are relevant -- pardon me.

25 UNIDENTIFIED SPEAKER: Sean, March 31st. Three

GENCO SHIPPING & TRADING LIMITED, ET AL.

17

1 months; three and a half months.

2 THE COURT: I was going to ask you, but I saw people  
3 popping up to see December. This case may have felt like it's  
4 taken that long, but it actually has been fairly brief. So --

5 MR. O'DONNELL: Yeah, I apologize. I get by with a  
6 little help from my friends.

7 THE COURT: Yeah, start from the top of the date so I  
8 can understand your point.

9 MR. O'DONNELL: Thank you. And there is a reason I'm  
10 mentioning the date.

11 THE COURT: Yes, no.

12 MR. O'DONNELL: So the e-mails themselves were  
13 December 16th and 17th, 2013. The RSA was signed on March  
14 31st, 2013 and --

15 UNIDENTIFIED SPEAKER: 2014.

16 MR. O'DONNELL: -- when we -- 2014, excuse me. Thank  
17 you.

18 UNIDENTIFIED SPEAKER: Not December; March.

19 MR. O'DONNELL: I'm going to do this one more time. I  
20 think I said it right this time but if not, I'm going to sit  
21 down and let somebody else come up and argue.

22 THE COURT: That's all right.

23 MR. O'DONNELL: So --

24 THE COURT: When things are done at a very -- I  
25 appreciate how quickly everybody got me what they got.

GENCO SHIPPING & TRADING LIMITED, ET AL.

18

1 MR. O'DONNELL: Okay.

2 THE COURT: And so I understand that there's a lot of  
3 doing things on the fly, so that's fine. And also, I can try  
4 to be of some help by actually just opening to the e-mails  
5 myself.

6 MR. O'DONNELL: Yeah.

7 THE COURT: So when you talk, I will do that.

8 MR. O'DONNELL: And I apologize, Your Honor, because  
9 I've already taken longer than I anticipated taking on this  
10 point.

11 THE COURT: That's all right.

12 MR. O'DONNELL: But again, the point is that the  
13 e-mails were December 16th and 17th of 2013 -- let me get this  
14 right -- and the RSA was signed March 31st, 2014.

15 THE COURT: '14.

16 MR. O'DONNELL: Okay. So those dates are relevant  
17 because you're going to hear when we get to the confirmation  
18 trial and when you actually have an opportunity to listen to  
19 experts opine as to the value of the debtors as opposed to  
20 musings in the shower or otherwise, the Baltic Dry Index, the  
21 BDI, is something that is a humongous driver of the debtors'  
22 value and of other shipping companies in this market. And the  
23 Baltic Dry Index for those respective dates since December 16,  
24 2013 and the date of the e-mails, Your Honor, it's dropped  
25 fifty-eight percent. As of the date of the RSA -- since the

GENCO SHIPPING & TRADING LIMITED, ET AL.

19

1 date of the RSA, it's dropped a respective thirty-nine percent.

2 THE COURT: Okay.

3 MR. O'DONNELL: So I really go back to a comment you  
4 made yesterday which is we could poll people in this room and  
5 it would be more efficient as to what they think the value is  
6 of the company but it probably wouldn't be any more or less  
7 probative than we asked what somebody says on their own.

8 And that goes to a point where maybe again we're  
9 talking past each other and there isn't in fact a disagreement,  
10 because what I heard Mr. Bierman say a moment ago is we're not  
11 asking for internal opinions as to value. Well, if that's the  
12 case, then we've got nothing to fight about because --

13 THE COURT: Well, let me just see if I can respond to  
14 one or two things you just said in the aid of efficiency: one  
15 is, I heard Mr. Bierman say he's talking about interaction with  
16 the debtors, and I think I've already ruled if there's  
17 interaction about value, that's relevant.

18 MR. O'DONNELL: We volunteered that, too.

19 THE COURT: Yes, so I think the only thing we're  
20 talking about is internal evaluations that are not shared with  
21 anyone else, and in reading the transcript in front of Judge  
22 Shannon, I was struck by a couple of things but relevant here  
23 was that he asked if the -- he noted that it was the debtors'  
24 burden and then he said is this party going to offer evidence  
25 of value.

1           So I know that there's a rebuttal report that's been  
2 much discussed but I don't think the time has yet come for that  
3 to spring into being. But that may be very relevant.

4           So he said if you're not going to be a proponent of  
5 value and you're not going to say here's what the value is and  
6 here's why, then I'll keep it out, but if you are, then we'll  
7 revisit it and then it would seem to be an appropriate subject  
8 for discovery.

9           So I realize the deadline for that has not yet come  
10 but certainly, it's something that Judge Shannon identified and  
11 I thought it probably makes sense to put that on the table now.

12           MR. O'DONNELL: Yes, Your Honor and I hope also you  
13 recognize that we made it a point to highlight that both in the  
14 quote from the transcript in our letter --

15           THE COURT: Yes. No, you gave --

16           MR. O'DONNELL: -- as well in the footnote.

17           THE COURT: I think it was very helpful; you gave the  
18 whole transcript to everybody so people could mine it for -- it  
19 wasn't selective. So no, that's fine and it's helpful to do  
20 that, so I can sort of see even some things that -- on an  
21 anecdotal note, he makes some comment about sitting through his  
22 last valuation trial promising he'd never do this again; why  
23 can't we just have an auction? Which I thought was very  
24 interesting and rather amusing. So, I totally agree.

25           But, yes -- no, the question is if we hue to that line

1 from your point of view that if you were going to offer  
2 evidence of valuation, that is in some sort of report with an  
3 expert, then that would seem to use the sort of trial lawyer  
4 view, you open the door to evidence of valuation. So I don't  
5 know if you have any thinking on that subject.

6 MR. O'DONNELL: We do and I anticipated questions  
7 along those lines which is precisely why we set forth in a  
8 letter and why we quoted the transcript to that point. I  
9 haven't had the privilege of trying a case before you yet, Your  
10 Honor, but you may find me bad with dates but you will find me  
11 forthcoming and I am not going to try and hide any of this from  
12 you.

13 THE COURT: Right.

14 MR. O'DONNELL: I do think as it relates to the  
15 reports, there are two points really: one is, as in Dolan,  
16 we're hopeful that we never have to put on valuation evidence  
17 and that the debtors' experts and we have a lot of faith in  
18 Blackstone, will carry the burden, et cetera. I have no idea  
19 yet what Rothschild's going to say. I'm not looking to  
20 besmirch them at all. They're a reputable firm. But we're  
21 reserving our rights as lawyers, too, particularly in these  
22 instances to have the right to look at it, not to introduce new  
23 valuation evidence but to critique to the extent we feel  
24 necessary, the report.

25 Those rebuttal reports, the equity report is not due

GENCO SHIPPING & TRADING LIMITED, ET AL.

22

1 until -- is due on June 11th. The valuation trial itself  
2 doesn't start until the 23rd. I have to confirm with my  
3 colleagues, but on the 12th, we could tell you whether or not  
4 we anticipate putting in rebuttal reports and that's almost two  
5 weeks before the valuation trial begins.

6 THE COURT: Right.

7 MR. O'DONNELL: That's a lifetime in the bankruptcy  
8 world. So I'm very comfortable with us revisiting the issue.

9 THE COURT: All right. But it's your position that if  
10 you do have a rebuttal report that talks about valuation, that  
11 then following that logic, you would open the door to a  
12 discussion of your clients' understandings of value.

13 MR. O'DONNELL: We also point out in our letter that  
14 we don't believe Judge Shannon viewed his ruling as  
15 precedential and --

16 THE COURT: Yeah, well --

17 MR. O'DONNELL: -- you take things on a case-by-case  
18 basis.

19 THE COURT: -- but you take the good with the bad.

20 MR. O'DONNELL: No, I'm kidding. I'm kidding.

21 THE COURT: But --

22 MR. O'DONNELL: So --

23 THE COURT: Yeah.

24 MR. O'DONNELL: -- But in all honesty --

25 THE COURT: Again, I think he's trying to -- and I was

1 thinking about it to myself, relevance is -- there are  
2 obviously some black and white situations. You're not going to  
3 ask the cab driver outside about the evidence of value of Genco  
4 unless he happens to have an interesting past. But most other  
5 things are shades of gray. And what I am trying to do is given  
6 the amount of time we have to not punt everything to the trial,  
7 because I don't think that benefits anybody, and I think we're  
8 trying to do this here and in a sensible way.

9 So I will say that I think if there is evidence of  
10 value and there's a rebuttal report by the RSA parties, that I  
11 do think then it does make sense to open the door to what  
12 historically speaking people said about value prior to the RSA  
13 because I don't -- then you're really in the shoes of the  
14 debtor that way and being a proponent of a valuation.

15 But I don't think we need to get there now but that  
16 would be my leanings. Let me hear everything from him and then  
17 I'll move back to you.

18 UNIDENTIFIED SPEAKER: Okay. Thank you, Your Honor.

19 MR. BIERMAN: I would like to be heard in between.

20 THE COURT: Yes, well fair enough.

21 MR. O'DONNELL: So that's our take, as well, Your  
22 Honor. We're perfectly fine with if we decide that we're going  
23 to put in a rebuttal report, we can come back here on the 12th  
24 and we can revisit what, if any, additional discovery is  
25 required by virtue of the rebuttal report that we intend to



1 submit. But again, we remain hopeful that may or may not be  
2 necessary.

3 THE COURT: All right. That's fine.

4 MR. O'DONNELL: Just -- I want to also just be very  
5 clear on what it was we volunteered yesterday and what we  
6 understood the Court to rule, order or agree with. So what  
7 we -- we really have kind of, as it relates to the RSA itself,  
8 you have three camps: you have the debtors, you have the  
9 secureds and you have the noteholders. And what we've said is  
10 anything -- any communications as to value pre-RSA or I guess  
11 it's the term sheet for the RSA is what we had in mind, but  
12 again we'll take guidance from the Court, but the  
13 communications from the noteholders to any of the lenders or to  
14 any of the debtors, any communications among those three  
15 groups, they can have it.

16 THE COURT: Right.

17 MR. O'DONNELL: I don't know that there's any there  
18 but, you know, even though I think we could argue the value of  
19 that evidence, we're not looking to draw the line in the sand  
20 there.

21 If I can have just one more minute to talk to the  
22 cases that are cited in the equity committee's letter. So,  
23 there are really two sets of cases that are relied upon there.  
24 The first is Chemtura, which you heard about a lot yesterday  
25 during argument, and my read of the Chemtura decision that

1 relates to evidence, other than the expert opinion, is that the  
2 Court understandably looked to comparable transactions as part  
3 of the valuation analysis. And of course we're not saying that  
4 a comparable transaction shouldn't be something parties at  
5 least consider and determine or whether or not there are  
6 relevant transactions that weigh in towards value. That's  
7 something to be decided later on. If they want to take  
8 discovery on that, they should have at it.

9           The other two cases that they talk about, Iridium and  
10 I believe it's Peltz -- yes, Peltz, and again, I apologize, I  
11 did have the pleasure of reading these on the subway on the way  
12 down, but these are fraudulent conveyance cases and they are  
13 dealing with a very, very different issue than what's going to  
14 be presented to this Court at the confirmation hearing. What  
15 they deal with is looking back in time as to the solvency of  
16 the debtor and determining whether or not a fraudulent  
17 conveyance claim could stand.

18           And Judge Peck, in the Iridium decision, did a very  
19 nice job, Your Honor, of illustrating for us all, the  
20 difference of the type of evidence that the Court was  
21 considering in that case. And what the Court did there was,  
22 you know, you have a defendant, Motorola, and then you had the  
23 unsecured creditors' committee as the plaintiff. And I'm at  
24 page 5 of my printout of the decision.

25           THE COURT: All right.

1 MR. O'DONNELL: But Judge Peck refers to how "Motorola  
2 refers the Court to Iridium's success in the capital markets  
3 and raising impressive amounts of debt and equity into an  
4 efficient public trading market in which Iridium securities  
5 traded within ranges indicative of substantial enterprise  
6 value. Motorola's solvency defense is grounded in this  
7 empirical data."

8 Similar -- and whereas in contrast, "The committee  
9 asked this Court to disregard historical market data as  
10 manifestly unreliable and accept the conclusions of expert  
11 witnesses who performed a discounted cash flow analysis using  
12 adjusted cash flow projections prepared in contemplation of  
13 litigation."

14 That doesn't have anything to do with this. What  
15 we're arguing about is whether or not musing in private as to  
16 the value, an opinion, a layperson opinion or somebody who is  
17 some sophisticated market participant but what they internally  
18 view as to value. If we were to try and offer up their  
19 testimony as to value, then they would get to depose them.  
20 They would have to be required by Rule 26 to put up a report  
21 and they get all the documents that go along with it. That's  
22 not what's happening here.

23 What they're saying is we have former noteholders who  
24 are opining at a particular point in time that's no longer  
25 relevant to the TEV of the debtors and we should have at that

GENCO SHIPPING & TRADING LIMITED, ET AL.

27

1 discovery and be able to put as much of that evidence as we  
2 want in front of the Court because it may show bad faith or it  
3 may undermine the valuation of the debtors.

4 Your Honor, yesterday you had mentioned, when you were  
5 listening to the discovery that the equity committee was  
6 talking about, that it started to sound like a thirty-day  
7 trial. Well, if Iridium is any example, that was a fifty-day  
8 trial, Your Honor, and it followed years of discovery and I  
9 don't think that's anything -- I don't think that's what we're  
10 looking for here.

11 THE COURT: All right. Thank you.

12 MR. BIERMAN: Your Honor, before Mr. Dunne, I would  
13 just briefly respond while the points are fresh?

14 THE COURT: Well, I usually like to hear everybody on  
15 one side and then everybody on the other side.

16 MR. BIERMAN: That's fine, Your Honor.

17 THE COURT: So --

18 MR. BIERMAN: Thank you.

19 THE COURT: -- we'll get to everybody and you'll have  
20 as much time as you need.

21 MR. BIERMAN: Thank you.

22 THE COURT: Certainly.

23 MR. DUNNE: Good afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MR. DUNNE: Dennis Dunne from Milbank Tweed Hadley &

GENCO SHIPPING & TRADING LIMITED, ET AL.

28

1 McCloy on behalf of Wilmington Trust Co. as agent for the 2007  
2 secured loan facility.

3 I just want to drill down on a couple of points. I  
4 guess I'll start off by saying we did not cite the Dolan  
5 transcript, so I feel less bound by the good and the bad in  
6 that transcript. But I do think our fact pattern here shows  
7 one of the difficulties with the conclusion, that if you file  
8 an expert report as rebuttal evidence, that you open the door  
9 potentially to the internal lender's valuation.

10 Why? Our client is Wilmington Trust Company. We're  
11 the agent's counsel for a syndicate that includes, you know,  
12 numerous lenders that change over time and I'm going to make a  
13 couple of points on that. As a result, we're not representing  
14 Apollo, Centerbridge, Davidson Kempner, for all confirmation  
15 purposes in this case. It's Wilmington Trust.

16 And more importantly, I think that looking at lender's  
17 internal valuation opinions and models and beliefs is flawed  
18 and unrepresentative by definition because you're only looking  
19 at those institutions who are currently in my syndicate, who  
20 are currently -- made a business decision to buy recently or to  
21 remain in the credit. And so it wouldn't be surprising that  
22 their internal views is or that they expect to make a profit  
23 and they're kind of bullish on shipping generally and bullish  
24 potentially on Genco specifically.

25 What's missing and why we believe it's

1 unrepresentative, and this would lead to chaos if I actually  
2 explored all this, is what's the other side of those  
3 transactions? The syndicate turned over greatly, you know, in  
4 the past weeks and months and year or so prior to the RSA; what  
5 if I looked at those lender's models and views of values who  
6 exited the credit? Those that sold their debt, some of whom to  
7 the parties that are standing here.

8 I can guarantee you that they're going to have a very  
9 different view of value and why is that not probative to this  
10 issue if you open the door? But as I said before, that would  
11 be chaotic to bring that in and to look at people who shorted  
12 the Genco securities or looked at the bank debt and didn't take  
13 a position because they didn't think that they could make some  
14 money.

15 So we view it as not only irrelevant at trial but not  
16 a proper inquiry within a deposition because it's not likely to  
17 lead to admissible evidence. Now that being said, I agree when  
18 they talk about these e-mails about what some investor, lender  
19 or bondholder said to the company or mused to a third party,  
20 oh, that's a fact, right? That's a fact that's going to come  
21 out. But their internal views on value is exactly that; it's  
22 in the nature of a lay opinion. I think we have agreement on  
23 that, that doesn't come in and that we'd be limited to these  
24 facts.

25 I raised my issue about representing Wilmington Trust

1 because I don't think that Judge Shannon's solution works for  
2 us because I would feel compelled then to look at the syndicate  
3 broadly and see what all their views were, both in terms of  
4 incoming and exiting lenders and we'd have offsetting views of  
5 value and we'd waste a lot of time and we would have an  
6 interminable trial.

7 And I also don't know at the end of the day what it  
8 adds, right, because what you would find, no doubt, is that a  
9 lot of these market participants are using very different  
10 assumptions, very different methodologies, and at the end of  
11 the day, what matters to the Court presumably by confirmation  
12 is or kind of two things: one is, did an alternative proposal  
13 materialize in the two-and-a-half months between the public  
14 announcement and the date of confirmation? If not, okay.  
15 What's the expert opinion and what were the actual  
16 methodologies used by the experts and were they reasonable or  
17 persuasive to Your Honor?

18 To overlay a number of individual lenders' views on  
19 methodologies and assumptions can only serve to be confusing  
20 and beside the point, particularly when we don't represent them  
21 individually for purposes of valuation, and to the extent we  
22 submit an expert report, Houlihan Lokey, that would be on  
23 behalf of Wilmington Trust, and they would not have seen or  
24 relied on the internal valuation models or musings of the  
25 lenders in the syndicate.

GENCO SHIPPING & TRADING LIMITED, ET AL.

31

1           So it's not something that they put into the mix when  
2 they were doing their report. I think it would be appropriate  
3 if they had to look at it but that will not be the case and  
4 they can certainly Houlihan that under oath when they -- if we  
5 actually get to the position where we put in a rebuttal expert  
6 report.

7           THE COURT: All right.

8           MR. DUNNE: And unless Your Honor has any questions,  
9 that --

10          THE COURT: I don't.

11          MR. DUNNE: -- concludes my remarks. Thank you.

12          MR. O'NEILL: Your Honor, just briefly. I'm not going  
13 to recapitulate what other people said. I'll only make the  
14 point that although we agree with what the lenders and the  
15 bonds are saying about lay opinions and the propriety of taking  
16 what's effectively expert testimony from unqualified third  
17 parties, I just make the point that we are the plan proponents.  
18 No one else is the plan proponent. The issue of good faith  
19 applies to the debtor and not to others and third parties'  
20 views of value don't impact on the debtors' good faith.

21          We're putting up five company witnesses, three  
22 experts. They have more than an ample opportunity to  
23 investigate the debtors' good faith. Talking to bondholders,  
24 talking to banks is not relevant to that.

25          And then a couple of little tweaks: the BDI is not an



GENCO SHIPPING & TRADING LIMITED, ET AL.

32

1 index of value. The BDI is an index of rates. Mr. O'Donnell  
2 is right that rates dropped by fifty-five percent according to  
3 the BDI from the end of last year to today. That obviously has  
4 an impact on value but it is not itself value.

5 THE COURT: It's not value. It's a proxy for saying  
6 something about value.

7 MR. O'NEILL: Yes, thank you, Your Honor.

8 THE COURT: All right. You're up.

9 MR. BIERMAN: Thank you, Your Honor. I think I will  
10 come to the podium.

11 Steven Bierman again for the official equity  
12 committee. Just a couple of quick points, Your Honor.

13 First, to be clear, again, we are looking for evidence  
14 concerning valuation and assessments and analysis as to what  
15 happened at the time, what people said and thought and believed  
16 at the time. We're not looking to qualify those persons or  
17 those entities as experts. It's factual evidence.

18 Now let me point out, Your Honor, that we've heard  
19 from everyone that stood up, interestingly, all on the same  
20 side of the issue. All of them represent clients that support  
21 this plan. They've come before you. They came before you on  
22 the first day hearing, Your Honor, and said -- counsel for the  
23 noteholders came before you and said, this is a plan that's  
24 fair, it's reasonable and it's in the parties' interest.

25 Are they not supporting the plan? They are

1 contractually obligated to support the plan. Are they not  
2 conveying to Your Honor the clear notion that they believe that  
3 this plan is made in good faith after negotiation and  
4 deliberation together with the debtors? Are they not putting  
5 that forward? Indeed, Your Honor.

6 We're not looking to take depositions of, as Your  
7 Honor put it, the cab driver outside or as Mr. Dunne put it,  
8 people who have come in and out of the equity. We're looking  
9 to take a handful of focused, short depositions of people who  
10 negotiated with the plan proponent, the debtors, who had  
11 conversations about it, and that's already the subject of  
12 testimony that Your Honor's allowed, and who brought to that  
13 table what they understood about the fundamental issues of  
14 value and fairness.

15 THE COURT: But when you say "brought to the table"  
16 that implies conversation and decision making among this group  
17 of debtors, noteholders and lenders, and I agree with you on  
18 that. So, but I just -- I mention it now because you keep  
19 talking in that language but that language, I think deals with  
20 something that I've already said is permissible.

21 MR. BIERMAN: Right.

22 THE COURT: So what I think we're focused on here is  
23 just the opinion in isolation. And so it came up in front of  
24 Judge Shannon where people were talking about the proprietary  
25 analysis that somebody would use to come up with their own in-

1 house opinion of value, whether that's a back of an envelope or  
2 something much more extensive, whatever it is, but not share  
3 with anybody outside of that shop.

4 And so the question is, if it's not shared with  
5 anybody outside of that shop before this case, and it's not  
6 going to be offered by anybody in this case, what's the  
7 relevance of it? And that's -- because you can understand how  
8 you can end up having mini-trials about all these different  
9 views on valuation because once they're introduced, you say  
10 well, we're introducing it for a limited purpose but, in fact,  
11 other people then say well, you're introducing this part but I  
12 want to introduce that part. So instead of having however many  
13 experts we now have which is, I don't know, six, eight -- I've  
14 lost track -- we're going to end up making witnesses of -- on  
15 valuation, albeit with certain caveats -- of other folks who  
16 are not in the lawsuit now.

17 MR. BIERMAN: I think not, Your Honor. We're not  
18 looking to do that and I don't believe that will happen.

19 THE COURT: Then what's the --

20 MR. BIERMAN: The point is several, Your Honor. In-  
21 house valuations informed the decision making by the parties  
22 that negotiated the plan and that in-house valuation, indeed,  
23 must have been informed by communications with the debtor. I  
24 think --

25 THE COURT: Yeah, but you're getting those. We keep

1 going back to that.

2 MR. BIERMAN: But the in-house valuations, whether or  
3 not shared, informed the decision making. It cannot be that  
4 these parties come before the Court and say that under the  
5 Bankruptcy Code, this plan is confirmable with the equity out  
6 of the money, with the valuation that underlies the debtors'  
7 plan. If it is the case, Your Honor, that they all or some of  
8 them knew at the time that there was good reason to believe  
9 that the valuation that the debtor would rely upon was low, I  
10 would think Your Honor would reserve, until the time of hearing  
11 that evidence, its admissibility and relevance because I would  
12 suggest that today is not the day to make that determination.

13 THE COURT: But I --

14 MR. BIERMAN: It can't be.

15 THE COURT: Well, let me just -- there's a couple of  
16 things. I got into relevance, and you're right, and you're  
17 right, relevance is often -- and in fact, that's one of Judge  
18 Shannon's first comments is can't we decide this later? And  
19 that's, I think, a default setting for all judges. But at the  
20 same time, we also run into the issue of managing both trial  
21 and pre-trial and some judges are more active in doing that,  
22 leading up to a trial and some are less. Some circumstances  
23 call for a more active hand than others.

24 And since we don't have much time under the schedule  
25 to get this all together, I am thinking seriously about where

1 this all fits. And so, in the discussion about the other issue  
2 that you've resolved which is the number of depositions, at a  
3 certain point -- I don't need to get into it because you have  
4 an agreement, I was just simply going to set a number and say  
5 take whoever you want. Here's your number.

6 And is that tied to relevance? No, but it's a time-  
7 honored and rule-recognized way of saying this is what's going  
8 to happen. And people do that with time limits, as well, both  
9 in depositions and at trial to say you decide what you think is  
10 the most important thing to do and if you decide that this is  
11 more important than say taking -- spending that time on an  
12 expert's deposition, then it's your time, do what you want with  
13 it.

14 MR. BIERMAN: Okay.

15 THE COURT: So I am concerned that your view is to  
16 view this only from your perspective which is to say well,  
17 here's what you're trying to do or not do, but I think once  
18 you're in for a penny, you're in for a pound. If we open up  
19 valuation evidence by folks that's not shared with anybody  
20 else, you're going to have mini-valuation trials.

21 MR. BIERMAN: Well, Your Honor --

22 THE COURT: I don't see any other way around that and  
23 I'm trying to figure out as Judge Shannon did, if the debtor is  
24 the proponent and there's not an intent -- putting Mr. Dunne's  
25 point aside for a second, if -- and the RSA parties are not a

GENCO SHIPPING & TRADING LIMITED, ET AL.

37

1 proponent, meaning they're not putting on evidence of value,  
2 you could always have this happen. You could have somebody  
3 who's a buyer in a 363 sale saying well, what is it that you  
4 think and is this all collusion.

5 I've certainly had a case in the not too distant past  
6 where there was only -- there was a lot of complaints by the  
7 folks out of the money saying this can't be right, it can't be  
8 right. We waited eight months to a year. No one else showed  
9 up. And I think in that case, if that door was opened, I'm  
10 sure the party in question would have walked through it and  
11 said I want to hear what they have, what they think about  
12 value.

13 MR. BIERMAN: I understand, Your Honor. We're  
14 certainly not looking to create collateral trials or mini-  
15 trials. We put before Your Honor in the correspondence over  
16 the last couple days, a couple of examples that suggest to us a  
17 serious concern about what --

18 THE COURT: But that's a perfect example. So let's  
19 take your serious concern.

20 MR. BIERMAN: Yeah.

21 THE COURT: So then we should have a trial -- you  
22 introduce that as evidence and say it was just one party's  
23 internal evaluation in December. So we'll tweak the facts a  
24 little bit, an internal evaluation in December. So then  
25 we're -- in addition to the trial on the actual valuation right

1 now as to whether the RSA and the related plan complies with  
2 the Bankruptcy Code, we're going to have a trial about the  
3 valuation in December and then hear evidence about what, if  
4 anything, we should take as a probative matter about that  
5 valuation in December.

6 Now, the normal way to do this is to funnel all the  
7 facts through the experts. So that's why I would think  
8 anything that you think is good that you learn in discovery,  
9 you'll immediately send your expert and the other side will do  
10 the same. And that's how it will magically appear, and it will  
11 appear in the context of an opinion that is recognizable under  
12 the rules.

13 So if we all put aside our bankruptcy hats for a  
14 second and think like the district court and the Court of  
15 Appeals do, they're going to say well, is it expert opinion?  
16 No, it's not. So it's lay opinion. All right. So it's either  
17 lay opinion that -- you have to walk a very tight line because  
18 lay opinion has two potential problems on either end. On the  
19 one end, it can be excluded because it's become an expert.  
20 It's somebody has said well, I'm taking my experience and now  
21 I'm doing some predictive stuff. Okay, you're out because  
22 you're really an expert.

23 On the other hand, it can be times that it's out  
24 because it's not based on anything. It's a back of an envelope  
25 sort of calculation. And multiple evidences of value here, I

GENCO SHIPPING & TRADING LIMITED, ET AL.

39

1 just -- I'm having a real gatekeeping problem thinking about  
2 where this is not just a multiple trials on evidence. I know  
3 you're saying you want to just use it for what's good for you  
4 but everybody's going to want to do the same thing.

5 MR. BIERMAN: Well, Your Honor, I think on the  
6 particular e-mail that we both may be thinking of, I think the  
7 point of that was actually not what Mr. O'Donnell was pointing  
8 you to about the timing of that party's evaluation but rather  
9 that there had been a conversation with Mr. Wobensmith about it  
10 and, of course, as Your Honor's already ruled, we're entitled  
11 to get that --

12 THE COURT: Yeah.

13 MR. BIERMAN: -- and take that where we can take it.  
14 So I think we're conflating a couple of things there.

15 In terms of the --

16 THE COURT: No, I changed your hypothetical. If you  
17 were listening, I changed your hypothetical --

18 MR. BIERMAN: No, I did. I did, Your Honor.

19 THE COURT: -- to say let's take such an evaluation by  
20 an RSA party done in December of 2013, which is not a far-flung  
21 hypothetical. So that was my hypothetical, to illustrate the  
22 concerns that I have.

23 MR. BIERMAN: I think it's a fair question, Your  
24 Honor, that if an RSA party that has come before you from the  
25 first day hearing onward, and presumably will always say or



1 imply that they support the plan, that the plan is fair, that  
2 the plan was arrived at in good faith and that the valuation  
3 underlies it, does not violate the absolute priority rule under  
4 Section 1129. That's the implication.

5 THE COURT: But that's the debtors' burden.

6 MR. BIERMAN: I understand that.

7 THE COURT: And that's what Judge Shannon pointed out  
8 and I -- I mean, that was discussed way before I ever got that  
9 transcript; who's trying the case? And I have said -- again,  
10 Mr. Dunne has put a sort of pin in that issue for the moment,  
11 but I've said if there is no evidence of value that's being  
12 advocated by the RSA parties where they come in and say we have  
13 now put our valuation, we've put up the flag and we have a  
14 standard bearer and we're walking into the Court with that,  
15 well then, people are going to take shots at you and that seems  
16 to me subject to talking about it further. If you don't do  
17 that, the question is what are we doing?

18 MR. BIERMAN: I understand that and I understand Your  
19 Honor's attempt to strike a fair balance on this issue. I will  
20 say though that in --

21 THE COURT: Because to be honest, I don't think Mr.  
22 Dunne thinks that's such a good idea at all. I haven't gotten  
23 there, but it's certainly -- again, in this case I'm deciding  
24 what I have to decide at the time; right now the record in  
25 front of me is that nobody of the RSA parties have advocated a

1 value.

2 MR. BIERMAN: Well, Your Honor, the other related  
3 issue -- the other shoe dropping, in effect, is about good  
4 faith. And I understand who has the burden on these issues,  
5 but nonetheless, it matters to everyone, all the lawyers here,  
6 the parties and the Court.

7 THE COURT: How could it matter if it's not shared  
8 with anybody? If the debtor has to have good faith in  
9 proposing a plan and we're talking about -- these hypothetical  
10 valuations we're talking about are not shared with the debtor.  
11 They're not shared outside of these groups -- the noteholders,  
12 the 2007 lenders, the debtors -- there's no crossing of that  
13 barrier. How is it relevant to the debtors' good faith in  
14 proposing a plan?

15 MR. BIERMAN: The noteholders and the other creditors  
16 have been made contractually obligated by the debtors to  
17 support the plan. They are made contractually obligated to  
18 take steps necessary to support it.

19 Their experts -- their professionals are being  
20 compensated by the debtor. It seems to me that --

21 THE COURT: Well, I don't understand your point.  
22 That's the true for RSAs, PSAs, prepacks. I mean, what does  
23 that have to do with valuation and good faith?

24 The debtors have to come in. I agree with you -- and  
25 again, we're going -- I want to make it very clear for purposes

1 of the record and this transcript so if any lucky judge has to  
2 revisit this issue -- that good faith in bankruptcy is about  
3 whether the debtor has good faith to satisfy that relevant Code  
4 provision in proposing a plan and asking that that plan be  
5 confirmed.

6 My understanding is that your concern about valuation  
7 is that, one, you're not getting the recovery as equity holders  
8 that you should get and, two, that the plan is not in good  
9 faith because everybody knows that this valuation is not  
10 accurate. It's a low ball.

11 All right. It's a not uncommon problem in bankruptcy  
12 court.

13 MR. BIERMAN: Understood.

14 THE COURT: Probably much to the dismay of various  
15 judges who have had to have extensive valuation trials. But it  
16 relies on a party and looks at what they know and what they  
17 made their decision on.

18 If it was never an input and it was done by a monk  
19 sitting in a cave somewhere and buried only to be unearthed  
20 thousands of years from now, but nobody knows it exists, how  
21 could it be relevant to the inputs and what the debtors were  
22 thinking in proposing a plan?

23 MR. BIERMAN: I'm caught in an awkward spot between  
24 two concepts here, Your Honor.

25 One is the burden that Your Honor has identified

1 regarding that the debtors bear and the fact in the procedure  
2 that, from the first day hearing onward through to  
3 confirmation, that other parties have stood up before Your  
4 Honor, and I assume may stand up again, and say that, as was  
5 said before by the ad hoc committee of noteholders on opening  
6 day, the informal convertible noteholders groups supports the  
7 assumption of the RSA. We think it's a reasonable exercise of  
8 debtors' business judgment.

9 What it does is provides a meaningful distribution to  
10 what we believe is an out-of-the-money equity class. If people  
11 are going to get up before you and undertake a burden that they  
12 don't have, is Your Honor going to discount that?

13 THE COURT: So what would you

14 MR. BIERMAN: Because if you're going to consider  
15 it --

16 THE COURT: -- I mean, aren't we elevating form over  
17 substance?

18 MR. BIERMAN: I hope not.

19 THE COURT: I mean, would you have them say we're part  
20 of the RSA so you know where I stand, and certainly that was  
21 the case in the case before Judge Shannon, right? There's a  
22 party to an RSA. It's the exact same factual circumstances as  
23 here. And would you have them get up and say but because I'm  
24 concerned is somehow being construed as being adopted a burden  
25 of proof that I am not going to say anything?

GENCO SHIPPING & TRADING LIMITED, ET AL.

44

1 I mean, what I was concerned about and I think is  
2 echoed in Judge Shannon's discussion is who is providing  
3 evidence? Who is standing up to meet the burden? It's the  
4 debtors' burden.

5 Again, I think that the RSA parties if they start  
6 providing evidence of value, then I think they open themselves  
7 up. And that's a very common concede in evidence in criminal  
8 cases, other civil cases. You just say well, it's off limits,  
9 but if you open the door, you open the door.

10 And so I think from a point of view of an evaluation  
11 of the debtors here, the debtors' value by a party done, not  
12 shared. I also think that -- we haven't gotten into it -- but  
13 there are other concerns identified by Judge Shannon in the  
14 transcript, which is what is it based on. Is it a proprietary  
15 model? What's the time frame for it?

16 And once you introduce those, there will need to be a  
17 response to those. And I will tell you that sitting here right  
18 now, I'm trying to do the parties a favor and not have us spend  
19 time at the trial that I don't think is going to be productive.

20 And I think rather than hear days of that testimony --  
21 and I can't see as how it's not going to take over the trial,  
22 because I think once we go there it's like nuclear weapons.  
23 You're going to get some. They're going to get some. And I  
24 think it's going to escalate.

25 I don't see any way it's going to deescalate. And I

1 think people will be back here asking for a modified discovery  
2 order given the circumstances if we open that door. And I can  
3 understand why they would because I think once you're in,  
4 you're in.

5 If we're asking for people who are parties to the RSA  
6 for their value, even if we're just asking those folks, you're  
7 going to say, well, we just want these folks, but then they  
8 could say, well, there are other parties to the RSA who we had  
9 to drag to the RSA kicking and screaming because their views of  
10 value weren't as bullish as these other folks.

11 And then what about the person who jumped out of this  
12 group just before the RSA? I mean, again, the debtors have the  
13 burden. If some other party is going to pick up that standard  
14 and raise it, then they're going to get shot at. And that  
15 seems fair. But if they don't, then I really don't know --  
16 putting aside the whole lay just classic federal case law on  
17 lay opinion, I have real problems with it as lay opinion.

18 It reminds me of a discussion I had in a Chapter 13  
19 panel of all things. Who's entitled to give the evidence about  
20 the view of a house? Okay. An expert? Okay. A debtor can do  
21 it because the debtor is an owner, much like an owner of a  
22 business, however big, however small.

23 And if it's somebody other than those two parties,  
24 they're lay opinion witnesses or they're experts. And why  
25 should they be in as lay opinion witnesses? And for the most

GENCO SHIPPING & TRADING LIMITED, ET AL.

46

1 part, they're not allowed. So it's, in a way, it falls  
2 straight into the standard evidentiary lines that are drawn in  
3 all cases, not just bankruptcy cases.

4 MR. BIERMAN: I appreciate that, Your Honor. I  
5 suppose the issue I'm trying to posit boils down to this, and  
6 then I'll be done. To the extent that anyone other than the  
7 debtors is getting up and making argument to you, submitting  
8 briefs in support of confirmation, submitting other support,  
9 whether or not it is "evidence" as such, unless Your Honor is  
10 going to somehow discount or ignore that, respectfully, I would  
11 encourage that the record be made open and be able to be  
12 created so that Your Honor can test whether they know better  
13 than what they're saying.

14 So I think to the extent --

15 THE COURT: I don't know what that means. What does  
16 that mean?

17 MR. BIERMAN: Well, I don't know whether -- I didn't  
18 hear, for example, Mr. O'Donnell or Mr. Dunne say that they're  
19 not going to put in briefs in support or other documentation in  
20 support.

21 THE COURT: People are parties to the case; they can  
22 do what they're going to do. If they touch the issue of  
23 valuation and say we are advocating a valuation, then they've  
24 crossed the line. And we'll discuss exactly what the  
25 appropriate way to handle that is, but I have strongly

GENCO SHIPPING & TRADING LIMITED, ET AL.

47

1 suggested that I think Judge Shannon has made a very wise  
2 decision in saying it's relevant for discovery and that we can  
3 fight about it for trial, but I would think at that point if  
4 somebody's going to put their nose in and talk valuation,  
5 they've opened themselves up to at least discovery.

6 And then we'll -- I'm trying to make a cut through  
7 this now in discovery and then we'll get to trial, but I  
8 just -- I'm having a real problem not making this into eight  
9 million mini-trials as to other people's evidence of valuation.  
10 And again, I think anything that was shared with anybody about  
11 valuation is fair game and it should be.

12 MR. BIERMAN: I will certainly take the depositions on  
13 the subjects Your Honor has approved. And as to these presumed  
14 briefs or other submissions I posited to Your Honor, I think  
15 we'll have to take a look at them at the time -- we'll ask the  
16 Court to take a look at them at the time --

17 THE COURT: Well --

18 MR. BIERMAN: -- for this reason, Your Honor, then I'm  
19 truly done. If someone is supporting approval of the plan,  
20 they are necessarily supporting the assumption underlying --

21 THE COURT: I reject that line, so if you're going to  
22 trot that out now, you can consider me have rejecting it now,  
23 because then what you're saying is by being in the case and  
24 being an RSA party they have advocated a valuation actively and  
25 have assumed a burden of proof. And that goes another step



GENCO SHIPPING & TRADING LIMITED, ET AL.

48

1 then to saying that these individuals -- which I would submit  
2 is a leap that I can't make -- that these individual's evidence  
3 of valuation in a vacuum is relevant here.

4 I mean, what did you -- I don't know what else to say.

5 MR. BIERMAN: I understand, Your Honor.

6 THE COURT: I don't know what else to say.

7 MR. BIERMAN: I understand, Your Honor, and I thank  
8 you for your time on this.

9 THE COURT: Because I thought that the general rule  
10 was for people who were -- you can make whatever objections you  
11 want. I understand that. Make your record. But please let's  
12 not waste time on posturing. It's a bench trial.

13 So if you start getting into, well, I want to object  
14 paragraph 54, argue that I shouldn't listen to it in your  
15 argument, but what do you really get by making that kind of  
16 statement? I just don't understand it. And if we're going  
17 to -- again, that's why I said I'm going to make all my rulings  
18 assuming it's a hotly contested environment, because all I've  
19 seen is everybody wants to fight about everything.

20 So I just ask you to use some common sense. You can  
21 argue in your opening, in your closing, through your questions  
22 of witnesses and advocate for your case. You have every right  
23 to do that and you should do that. I have no problem with  
24 that. So all your arguments about valuation and how it should  
25 be construed, I fully expect you to say, well, the RSA parties

GENCO SHIPPING & TRADING LIMITED, ET AL.

49

1 have said this, that and the other thing. Here's what the  
2 debtors have and they notably haven't provided any valuation  
3 testimony because maybe they don't want to expose themselves.

4 I mean, you could make whatever arguments you want to  
5 make. That's fine. That's all part of what's presented in  
6 front of me. And what is not presented in front of me is in  
7 evidence, but certainly I can note the fact that it's not  
8 there, which courts do all the time in all sorts of other  
9 context.

10 MR. BIERMAN: Again, thank you, Your Honor.

11 THE COURT: All right.

12 MR. DUNNE: All right. And just clarifications,  
13 Judge, I think I understand it which is, on my issue -- the  
14 Wilmington Trust issue, we put a pin in that. It may or may  
15 not be relevant. We may not need to get there if, for  
16 instance, we don't put in rebuttal expert opinions, we're never  
17 there. And the internal, you know, valuation data doesn't come  
18 out. The third party to third party what people say to  
19 somebody else about values certainly is fair game.

20 And also, I thought I heard the Court reject the  
21 notion that if we do not put in a rebuttal expert opinion, but  
22 the record is whatever the record will be created by the  
23 debtors and the equity committee, we can make legal argument  
24 off of that --

25 THE COURT: Yeah. I think that's fine. I think

1 that's fine. The record is what it is. Again, I think if  
2 you're advocating, meaning you're putting in a witness that  
3 changes things in my mind.

4 MR. DUNNE: Right. And if that happens, we'll come  
5 back and talk about my issue about the -- I want to be clear  
6 Mr. Khalil reminded me that we recently agreed to represent the  
7 steering committee defensively solely with respect to their  
8 document production requests and depositions to facilitate that  
9 so that they didn't have to hire, you know, five, six different  
10 law firms so that we could keep --

11 THE COURT: Right.

12 MR. DUNNE: -- to the schedule.

13 THE COURT: All right.

14 MR. O'DONNELL: So this goes against the fundamental  
15 rule of advocacy which is when the judge rules in favor of you  
16 run for the door.

17 THE COURT: I was going to say, but it run through my  
18 head, but

19 MR. O'DONNELL: So I just --

20 THE COURT: -- there are more things in heaven and  
21 earth as the Bard says.

22 MR. O'DONNELL: Yeah, and I'm not asking for my cake  
23 and eating it also. I just want to -- there were a couple of  
24 times when we were talking about the impact of this Court's  
25 ruling where I wanted to make sure we were clear so we're not

1 in front of you again in terms of what it means.

2 So absolutely to the extent that somebody in the  
3 noteholder group made communications to the debtors, or to  
4 Wilmington Trust, the secured lenders, as relates to value  
5 prior to the RSA, they can have it.

6 There was a little bit of a colloquy about if anybody  
7 says anything to anybody about value, of course you can have at  
8 it. I don't interpret that -- or I didn't interpret it, unless  
9 you tell me otherwise, to mean if members of the noteholder  
10 group express a value among themselves, but they don't express  
11 it with the debtors, they don't express it with the lenders,  
12 that to me would still remain proprietary information based on  
13 your ruling, but I --

14 THE COURT: Well, then you get into the common  
15 interest privilege. Am I sort of getting a sense of what tree  
16 you're barking up?

17 MR. O'DONNELL: Yeah. Actually, and it's not -- so  
18 the common interest privilege, as you know, is an extension of  
19 the attorney-client privilege. And this would also be work  
20 product as well presumably because its valuation, maybe or  
21 maybe not done in anticipation of litigation, only is waived if  
22 it's shared with an adversary.

23 The probative value if it's said among the lenders as  
24 it relates to the good faith of the plan, and it's never said  
25 to the debtors, I think remains the same.

1 THE COURT: Well, I suspect -- I'm not saying this  
2 isn't important, but at the same time I would expect that what  
3 we're really talking about is the internal valuations that they  
4 put together by themselves then sharing them among their  
5 constituency.

6 MR. O'DONNELL: Right. That's what I'm referring to.  
7 And if it's within -- again, you've got your three camps:  
8 you've got the notes, you've got the lenders and you've got the  
9 debtor. And if it's shared among one of those camps, but it's  
10 not shared with the lenders, it's not shared with the debtors.  
11 I don't understand how that would go to the good faith and I  
12 didn't understand your ruling otherwise.

13 THE COURT: Let me ask Mr. Bierman's view on that.

14 MR. BIERMAN: And, Your Honor, I hope we don't have to  
15 quibble about who won what. We've all listened to Your Honor  
16 and your well expressed and clear views on the subject. And I  
17 think we go forward from this hearing understanding how to  
18 proceed.

19 THE COURT: Well, is there a dispute about this issue  
20 because it'll just rebound back at me in about an hour? So I  
21 really don't --

22 MR. BIERMAN: I don't --

23 MR. O'DONNELL: I'm now glad I stood up.

24 THE COURT: -- I understand that parties sometimes  
25 really say I don't want to have to get into this, but I expect

GENCO SHIPPING & TRADING LIMITED, ET AL.

53

1 we're going to walk out of the courtroom and have this problem.

2 So I don't know if it's an issue or not.

3 MR. BIERMAN: No.

4 MR. O'DONNELL: I don't think so, Your Honor.

5 THE COURT: All right.

6 MR. O'DONNELL: Okay. Thank you, Your Honor.

7 MR. BIERMAN: Thank you.

8 THE COURT: All right. Thank you.

9 MR. O'DONNELL: Thank you for your time. I'm sorry  
10 for two days of discovery.

11 THE COURT: No, that's fine. And again, there were  
12 other limitations I thought I might have to impose in discovery  
13 and I'm not because I think parties worked the other issues  
14 out. I appreciate that.

15 Again, I think my concern is about the scope of the  
16 trial. I don't think it does anybody a service by allowing  
17 people to get into sort of these independent or these separate  
18 not shared views of valuation and then spend all this time  
19 working that up and then show up at trial and say I don't want  
20 to hear that. I think that's unfair to everybody.

21 You have enough stuff to do otherwise, and if there  
22 are rebuttal reports, I expect we'll have a discussion and  
23 we'll need to have a discussion about what's open season,  
24 although, I certainly have given you my inclinations as to how  
25 that would work.

GENCO SHIPPING & TRADING LIMITED, ET AL.

54

1           So, but let me just -- unless anybody has anything  
2 else, I'm just going to make a few comments on the record as  
3 to why I ended up where I ended up so any reviewing court has  
4 an idea.

5           MR. RENENGER: Thanks, Your Honor. Aaron Renenger  
6 from Milbank on behalf of Wilmington Trust.

7           Just briefly there may still be a ripe issue with  
8 respect to the number of depositions of lenders. I heard the  
9 number six stated earlier today. That was in the letter that  
10 was sent this morning, Your Honor.

11           I don't know whether that's still the equity  
12 committee's position, they need six lender depositions. It  
13 would be our position that that is cumulative, duplicative and  
14 unduly burdensome.

15           THE COURT: Well, that's the number that was  
16 identified for me before at the last conference. And I will  
17 say this, that I think it's got to be -- the numbers that we're  
18 talking about and the depositions that have been discussed  
19 today and yesterday are the universe without it being subject  
20 to expanding based on additional documents or other concerns.  
21 So you make your choices.

22           It is subject to be expanding only in the event of  
23 rebuttal experts. And that seems to be fair. You can't depose  
24 with somebody on something you don't know they're going to talk  
25 about.

GENCO SHIPPING & TRADING LIMITED, ET AL.

55

1           So at this point, I think there's a lot of RSA  
2 parties. I am not well versed enough to know exactly what's  
3 out there in terms of the documents. I would submit to you  
4 that any prolonged discussion of that, in terms of cumulative  
5 and the number of these six depositions is ultimately probably  
6 going to be unproductive for all of you to sit through and  
7 educate me on and it will probably take more time and expense  
8 going that way.

9           So at this point I'm just inclined to let the six stay  
10 and again, I was going to come up with a cap, which I'm not  
11 going to do, but I understand essentially cap has been self-  
12 imposed. We're talking about eight for the debtors. We're  
13 talking about six for the lenders. And that's discovery  
14 subject to any rebuttal expert reports.

15           So again, I think for me to reach any intelligent  
16 conclusion and preclude any of those six, I really will need a  
17 significant education. And I've got to say it's probably not  
18 worth your time to do that. It's probably faster to take these  
19 depositions for a couple of hours. It's probably faster to  
20 just take the deposition and be done with it. And it probably  
21 makes more sense for the purposes of having a robust record in  
22 which to try the case.

23           MR. RENENGER: Your Honor, I guess -- thank you for  
24 that. And I would just -- the point I would make is that we  
25 would just want to reserve the right, Your Honor, to the extent



GENCO SHIPPING & TRADING LIMITED, ET AL.

56

1 that meet-and-confer discussions on the number of depositions  
2 aren't productive, to come back.

3 The position that we'll take --

4 THE COURT: Well, what discussions are there? I think  
5 the six were identified for me yesterday and so I think they  
6 are what they are. And that's what I presume the number is  
7 based on for today was the six of yesterday; is that right?

8 MR. NAGIN: Yes, Your Honor, Benjamin Nagin from  
9 Sidley Austin also for the official committee --

10 THE COURT: You want to slide that. Thank you.

11 MR. NAGIN: Sure. And we're talking about, just to be  
12 clear, we're talking about six lenders and noteholders  
13 together. And maybe we can do less than that.

14 MR. RENENGER: A total of six?

15 MR. NAGIN: Correct.

16 MR. RENENGER: A total of six.

17 MR. NAGIN: Yeah, right.

18 THE COURT: And that's the same number as yesterday?

19 MR. NAGIN: Yes.

20 THE COURT: That includes their advisors and things of  
21 that sort or is it --

22 MR. NAGIN: It does not Houlihan or Jeffries, no.

23 THE COURT: All right. Well, yesterday I heard, I  
24 thought, three folks: Apollo, two others and then the two  
25 financial advisors for those folks. So I think that's how I

GENCO SHIPPING & TRADING LIMITED, ET AL.

57

1 ended up with five and I forget the sixth is a bit fuzzy in my  
2 memory.

3 MR. NAGIN: Well, we'll --

4 THE COURT: So this would be an expansion of that if  
5 you're talking about the six just of the noteholders and  
6 bondholders.

7 MR. NAGIN: Then we'll make it six with -- I don't  
8 remember exactly how yesterday's conference went, but we will  
9 make it six, inclusive of Houlihan and Jeffries.

10 THE COURT: Right.

11 MR. NAGIN: And then the remaining four will be some  
12 combination of noteholders and lenders.

13 THE COURT: All right. That work for you?

14 MR. RENENGER: Thank you, Your Honor.

15 THE COURT: All right. Thank you, I appreciate your  
16 accommodation that way.

17 MR. NAGIN: Thank you, Judge.

18 THE COURT: And in fact you've ended up exactly where  
19 I was going to be if I had imposed a cap, which is to say the  
20 experts, the three, and one more just to see however else  
21 things work out in the discovery that you're getting. So as my  
22 grandmother used to say, reasonable minds agree or fools seldom  
23 differ. We can, you know, figure out where this fits in.

24 So in light of all that, is there anything else we  
25 need to discuss here this afternoon?

GENCO SHIPPING & TRADING LIMITED, ET AL.

58

1 MR. ROGOFF: Yes, Your Honor, for the record Adam  
2 Rogoff on behalf of the debtors. With permission I

3 THE COURT: Are we segueing over to the --

4 MR. ROGOFF: Well, I'm going to segue to just tell you  
5 where we are.

6 THE COURT: Right.

7 MR. ROGOFF: And then I'm going to ask with Your  
8 Honor's permission if we can just take a break. We've been  
9 having discussions with counsel to the equity committee as well  
10 as counsel to Rothschild in an effort to amicably resolve the  
11 oral application.

12 As Mr. O'Neill indicated earlier, there are proposals  
13 that have been made to Rothschild and the equity committee on  
14 behalf of the company, working in coordination with the  
15 supporting creditors that objected to the written application.  
16 Our offer is currently being considered and reviewed by the  
17 equity committee counsel as well as Rothschild's counsel.

18 We are waiting for them to come back. I'm hopeful  
19 that we will be able to present something which is consensual  
20 to Your Honor.

21 THE COURT: How long do you think you need to finish  
22 those up?

23 MR. ROGOFF: I would imagine that if we take another  
24 fifteen minutes.

25 THE COURT: All right.

1 MR. ROGOFF: I mean, during this entire hearing I've  
2 been sort of moving in and out of the courtroom to try to close  
3 the gap on the open points.

4 THE COURT: And are the people here the same people  
5 you need to chat with?

6 MR. ROGOFF: The people that I'm working with are  
7 actually in a conference room down the hall

8 THE COURT: All right.

9 MR. ROGOFF: -- but they are present.

10 THE COURT: All right. Then what I'm going to do is I  
11 just want to put a couple of observations on. I think when I  
12 said anything else I meant discovery. I didn't say it out  
13 loud. But why don't you continue to have those discussions.  
14 I'm just going to make a few points for purposes of the record  
15 as to why I came out where I came out in discovery. And then  
16 that will eat into the fifteen minutes, then we'll take a  
17 break.

18 First of all, I just want to confirm and I think it's  
19 the case that all the submissions on this discovery issue on  
20 valuation were put on the docket, so they're on the record. I  
21 think that that's right.

22 MR. O'DONNELL: It is for the noteholders, Your Honor.

23 THE COURT: All right. Uh, and I think that's true  
24 for the committee, as well and --

25 MR. O'DONNELL: And the lenders as well.

GENCO SHIPPING & TRADING LIMITED, ET AL.

60

1 THE COURT: -- and the lenders. All right.

2 MR. BIERMAN: It is for the equity committee. Thank  
3 you, Your Honor.

4 THE COURT: All right. Thank you.

5 So I'm just going to comment in no particular order,  
6 actually just based on what I have in front of me in my various  
7 notes. So just to make a few observations.

8 And the first of which is, I did read Judge Shannon's  
9 comments in the In re: Dolan Company transcript that was  
10 provided. I understand it is not precedential. I think it is  
11 helpful in that it is his thoughts thinking out loud through  
12 the issues. And I would agree with the equity committee that  
13 he is taking the case as it is and just as I'm trying to do in  
14 this case.

15 And I think that in thinking both about case  
16 management, trial management, cost, expense, all the things  
17 that are in Federal Rule 1 and 16 of the Federal Rules of Civil  
18 Procedure, as well as just the facts of this case, I think his  
19 comments and musings are instructive in this case because it is  
20 factually very similar where you have an RSA party who is not  
21 going to be presenting evidence on valuation at the trial.

22 The question is whether their internal communications  
23 and views on values shared with nobody outside their group  
24 would be relevant. And I think that in that case, the court  
25 made a number of comments, is that he viewed it as generally

GENCO SHIPPING & TRADING LIMITED, ET AL.

61

1 not an appropriate area of inquiry, drew an analogy to a 363  
2 sale in a buyer's view. I think he is very concerned, as am I,  
3 about opening the floodgates to having many, many trials --  
4 individual, separate trials about valuation where everybody's  
5 individual views are expressed. And while I know that the  
6 committee here has only asked for a few witnesses, I think the  
7 principles are the same.

8           Once we open up the door to that, I would fully expect  
9 that the other side would say, well, we have other -- people  
10 have other views. And then we'll have to think about how to  
11 cabin those folks off in terms of the level of their  
12 consideration, the timing of their consideration, any biases  
13 they might have, and there are thirty RSA parties.

14           I made the comment earlier, and I think it's true,  
15 that most courts expect that something like valuation in this  
16 context will be addressed by experts in the context of  
17 different valuation methodologies, considering all the things  
18 that they have in the record. And I think here, given the  
19 production of documents, it's been much discussed, but I think  
20 has now been concluded or is in the process of being concluded  
21 to everyone's satisfaction.

22           That is all grist for the mill, for any expert to say,  
23 well, I considered this and I considered that. And as part of  
24 that, here, you will have any communications between the  
25 noteholder group on the one hand, the lenders on the other

1 hand, and the debtors on the other hand in terms of expressions  
2 about valuation, which I think is completely appropriate.

3 But in terms of having mini-trials, I agree with Judge  
4 Shannon that I don't believe it's a discrete or narrowly  
5 focused inquiry. It may start out as one, but I don't think it  
6 would end up there.

7 I also think if we went down that road, we would end  
8 up having arguments about confidentiality and sensitive  
9 business information, because as anybody who has sat on this  
10 bench for any length of time knows that how people value things  
11 often is a proprietary consideration. And I think there's no  
12 way we wouldn't end up there, or certainly is a very good  
13 chance that we would.

14 I do think it all would be of limited relevance to the  
15 inquiry. Again, I think Judge Shannon talks about the burden  
16 resting with the debtor on the value of the company. I would  
17 agree with that. And I think there's been a robust discovery  
18 process that's ongoing as to the debtors and their views about  
19 value.

20 Finally, I would echo Judge Shannon's views, at least  
21 preliminarily, without ruling at this point, but he does make a  
22 comment that this type of inquiry is not appropriate unless a  
23 party becomes an active participant in presenting evidence and  
24 testimony to the court regarding the value of the company. And  
25 that's on page 21 and 22 of the transcript.

1 And he uses the term "vigorously participate", but I  
2 think he cabins that off by saying, "To seek to demonstrate  
3 with its own evidence that in fact the value of the business is  
4 X and here's why." So I think that that is the appropriate  
5 line.

6 That's why I think participation in the form of  
7 briefing and legal argument is permissible by the RSA parties,  
8 but I do think that if somebody's coming in with its own  
9 evidence, and I think that's the touchstone for Judge Shannon,  
10 and I think it's the touchstone for me as well.

11 Turning to a few other cases that cited by the  
12 parties. I will mention first the discussion in the Iridium  
13 case. It's an extensive opinion that reflects an extensive  
14 trial. It was cited for the proposition that essentially  
15 analysts' views about -- and the market's views about the value  
16 can be of some use, but I think it has to be understood in the  
17 context of the dispute in that case.

18 In fact the opinion is littered with caveats. So for  
19 example, in footnote 2, it talks about business judgment and  
20 whether it was prudent to invest in or extend credit to the  
21 company. It says, "These business judgments, while anecdotal,  
22 imply that it was insolvent."

23 So it's a much broader inquiry and this is made clear  
24 in subsequent discussions. So on page, I think it's roughly  
25 334 of the opinion under the subheading B, "Analysts", it talks



1 about analysts and their view about the equity value. But goes  
2 on to cabin it off by saying, "Those assessments do not  
3 establish that the value of the company was within that range.  
4 It essentially provides insight into what the contemporaneous  
5 thinking was."

6 And while that is related, it's not the same. This is  
7 again, this distinction is revisited on pages 347 and 348 that  
8 talks about confirming the validity of management's projections  
9 as an indication of reasonableness, but it goes on to cabin  
10 that off by saying that, "In fact, although these analyst  
11 reports were not admitted into evidence for the truth of their  
12 conclusions reached regarding Iridium's enterprise value," and  
13 further by saying, "These assessments of value by analysts do  
14 not establish the value of Iridium."

15 The context of that case needs to be understood as to  
16 why that evidence was mentioned at all. It's not as to a  
17 specific value. And here that's exactly what we're talking  
18 about, the specific value of the company.

19 I think the other cases cited are a discussion about  
20 similar things. I think that it also is important that the  
21 discussion, Iridium uses its touchstone as the stock price more  
22 than it does the independent evaluations. There's not a whole  
23 lot more in the other cases that I haven't covered in  
24 discussing Iridium.

25 But moving on to a few other cases that are

1 identified, one is CopeLink & Sons (ph.), and in that case, it  
2 talks about the Second Circuit, Bank of China case and the  
3 distinction between expert opinion and lay opinion. I think  
4 this is sort of an independent way of looking at this as well  
5 under Rule 701. And it talks about the value of a business,  
6 that an outsider's personal perception would be modest at best,  
7 and really that that evidence, the value of a business,  
8 traditionally involves the testimony of bona fide experts  
9 except in cases where the actual owner of the business might  
10 have the requisite personal perception. And I think that  
11 that's a very important line, and that's the line not only for  
12 evaluation but for all testimony -- opinion testimony. So I  
13 think it has here marginal relevance. It's not shared with  
14 anyone else and certainly will balloon this trial beyond  
15 anything recognizable in its current form.

16 I also note that in I believe it's Judge Gropper's  
17 decision, in MarketXT Holdings Corporation, he echoes the same  
18 idea that you don't want to have a lay opinion, turns out to be  
19 an expert in lay opinion clothing, but at the same time you  
20 also have the converse concern about someone's evidence of  
21 value being too speculative to be helpful to a clear  
22 understanding of the fact at issue as required by Rule 701.

23 And I think the capper for all this probably, and a  
24 fitting place to stop, is his reference to Charter  
25 Communications where he quotes the case as saying the art of

1 valuing a business requires the exercise of well-informed  
2 judgment and experts, that it's a terribly subjective and fact-  
3 intensive nature of valuation, projection of profits; the  
4 testimony from nonexperts regarding profit can be excluded as  
5 improper lay opinion.

6 And again, this view and the distinction between  
7 expert opinion and lay opinion, what's permissible lay opinion  
8 is also revisited in the Fifth Circuit's decision in Dojo, Inc.  
9 (ph.) which is cited by the parties and the distinctions  
10 between Rule 701 and 702. And it notes that a lay witness who  
11 was never employed by or directly involved in a business is  
12 unlikely to have the type of firsthand knowledge necessary to  
13 provide a reliable forecast of future lost profits. And it  
14 goes on to talk about only two cases where an individual  
15 provided information about lost profits where the individual is  
16 not a current or former employee, officer or director of the  
17 business. Again, it's a different context, but again, I think  
18 it exposes the concerns out having a lay opinion on valuation  
19 that's not from an expert or the owner of the business.

20 So those are a few observations, just an understanding  
21 why I came out where I came out. And again, this is all  
22 subject to revisiting if, in fact, there is a rebuttal expert  
23 report provided on valuation at which point a RSA party  
24 potentially becomes the standard bearer in terms of burden, in  
25 terms of valuation.

1           So in light of that, I think we are waiting for  
2 further discussions, so I will recess for fifteen minutes, but  
3 I assume probably folks will just knock on the door when you're  
4 ready. But I'll plan to come out no later than 4:30 just so we  
5 can find out where things are.

6           IN UNISON: Thank you, Your Honor.

7           THE COURT: Thank you.

8           MR. O'DONNELL: Your Honor, my partners, Mike Stamer  
9 and Sarah Schultz, are going to stay here, but with the Court's  
10 permission may I be excused now that this part is over?

11          THE COURT: By all means.

12          MR. O'DONNELL: Thank you.

13          THE COURT: Thank you. And that's true for anybody  
14 else who finds that they have some other things to do in life  
15 which is probably all of you.

16          IN UNISON: Thank you.

17          (Recess from 4:02 p.m. until 5:12 p.m.)

18          THE CLERK: All rise.

19          THE COURT: Good afternoon once again. Please be  
20 seated.

21          So what news?

22          MR. BURKE: Good afternoon, Your Honor. Michael  
23 Burke, Sidley Austin, for the equity committee. Thank you  
24 again for permitting us to make an oral application yesterday.

25          And we spent a good portion of the day with the

GENCO SHIPPING & TRADING LIMITED, ET AL.

68

1 supporting creditors and the debtor. And subject to what Mr.  
2 Rogoff has to say, we would like to propose the following, Your  
3 Honor. We believe that we have a deal on the economics of the  
4 transaction. There are still open issues related to, among  
5 other things, the engagement letter. We just ran a bit short  
6 of time, so what we would propose, with Your Honor's  
7 indulgence, is either tomorrow we enter a consensual form of  
8 order, file it under certificate -- certification of counsel or  
9 I believe Your Honor has reserved time on Friday. We don't  
10 want to impose another hearing date on you, but if there is no  
11 form of -- agreed form of order tomorrow, we would come back to  
12 you Friday. We will use the next twenty-four --

13 THE COURT: All right. But you've worked out the  
14 economics. Does it make sense to put that on the record now or  
15 do you want to wait or what do you want to do?

16 MR. ROGOFF: Your Honor, for the record, Adam Rogoff.  
17 I'd prefer that we not. There have been proposals that have  
18 been made. They're a package of proposals; they're not just  
19 the economics but also going to the terms and the conditions  
20 upon which a fee would or wouldn't be earned. I'm not going to  
21 get the specifics, but there's been some back and forth, I  
22 think productive back and forth during the course of the day  
23 between the company Rothschild with the support of the  
24 supporting creditors that had objected to the written  
25 application. We've made a lot of progress, but we're not there

GENCO SHIPPING & TRADING LIMITED, ET AL.

69

1 yet. We are all hopeful that we will be able to come up with a  
2 consensual form of order and then would propose to simply  
3 submit that to Your Honor, of course subject to Your Honor's  
4 rights to want to ask questions or have a hearing on it.

5 But since it's still evolving back and forth, I'd  
6 rather not start identifying individual --

7 THE COURT: No, no, that's fine.

8 MR. ROGOFF: -- components that could shift.

9 THE COURT: That's fine. Let me ask whether -- and  
10 I -- it's my role to sort of be an official nudge in these  
11 situations and -- but that said, is it helpful to just keep  
12 everybody here not courthouse to finish this? Is there some  
13 benefit to, while everybody's here, put in the final nails in  
14 the coffin, or does it make more sense to go -- well, I don't  
15 mean such a good metaphor -- to get this done, or does it make  
16 sense to say, well, we need to talk to various constituencies  
17 and so it makes sense for us to take a break?

18 MR. BURKE: Your Honor, we -- I believe I can speak  
19 for counsel for Rothschild's as well. We'll stay as late as it  
20 takes to try to hammer this out, pardon the expression,  
21 tonight.

22 THE COURT: All right.

23 MR. ROGOFF: Your Honor, I have no objection to  
24 remaining the try to get this resolved. We'd like to get it  
25 resolved. It's just a function of how quickly Rothschild can

GENCO SHIPPING & TRADING LIMITED, ET AL.

70

1 respond on the open points.

2 THE COURT: All right. Let me ask Mr. Hahn -- not to  
3 put you on the spot, but from your point of view, given the  
4 conversations you're having with your client, do you think it  
5 would be helpful just to be here in the interest of making the  
6 push to get it done -- there's a happier metaphor for you -- or  
7 does it really not make a whole lot of sense and we're just  
8 depriving people of the comforts of their office and everyone  
9 has e-mail and phones and what difference does it make?

10 MR. HAHN: Well, I hesitate to make predictions, Your  
11 Honor, or I would have.

12 THE COURT: Yes.

13 MR. HAHN: I, in fact, have predicted this was going  
14 to be done long before it is. But Rothschild, I think, would  
15 like to try to close this off as soon as possible and certainly  
16 tonight if we can do that.

17 THE COURT: All right. Well, unless there's some  
18 objection as to this not being helpful, why don't we try to get  
19 it done here just in the interest of striking while the iron is  
20 hot. The reason why I say that is I'm sort of getting the vibe  
21 that you're close, and I don't think it serves the benefit for  
22 anybody to drag this out. So again, if it's going be  
23 counterproductive, tell me that. I don't know. I'm just doing  
24 the best I can to sort of make these calls from what I see.  
25 But if it's going to be counterproductive, tell me that. But

GENCO SHIPPING & TRADING LIMITED, ET AL.

71

1 if not, I would just say let's get it done here because it adds  
2 a little bit of urgency even if it's a bit artificial.

3 MR. HAHN: Your Honor, I think that's fine from the  
4 company's perspective. The only thing I would just note is we  
5 are waiting to get this resolved with the business party who's  
6 not here. And so it's just a function of how quickly  
7 Rothschild can respond to the open issues. If they can move  
8 with the same diligence as if they were in the courtroom and  
9 desire to get home as the rest of us, that's fine. But we are  
10 coordinating with a party that's not present.

11 THE COURT: Mr. Hahn, maybe you can -- I mean, they're  
12 in town, right, so maybe you can tell if it doesn't get done  
13 soon that we'll just ask them to come down and join us. That  
14 probably will have some beneficial --

15 MR. HAHN: I can't speak for where my client will be  
16 tonight. I think he has been responding timely. I would point  
17 out the proposal we've been debating, we got out an hour before  
18 the Court today. So it's not as if sitting on it for a long  
19 time.

20 THE COURT: No. Again, I'm not casting any  
21 aspersions. I'm just --

22 MR. BURKE: He is available by phone though, Your  
23 Honor.

24 THE COURT: I'm just trying to get this done. So what  
25 I'd ask is that you reach out to your client and say, the judge



GENCO SHIPPING & TRADING LIMITED, ET AL.

72

1 is sticking around, everybody's sticking around with the  
2 expectation this is getting done soon, and by "soon" meaning  
3 real soon.

4 MR. BURKE: Soon, right.

5 THE COURT: And I would trust that Mr. Hahn's desire  
6 to move on with the rest of his life will also add to the  
7 urgency since, while his client is not here, he is. So let's  
8 do that. And what I will say is that it's a quarter after 5.  
9 We've taken forty-five minutes really I think -- I'm beginning  
10 to lose track as to the time. Why don't we reconvene in half  
11 an hour with the thought that there will be an answer on these  
12 points because at a certain point -- this is not a fine wine;  
13 it doesn't get better with age, so we might as well see what we  
14 can do with it, all right?

15 MR. BURKE: Thank you, Your Honor.

16 THE COURT: All right. Thank you very much for all  
17 your efforts.

18 IN UNISON: Thank you, Your Honor.

19 (Recess from 5:18 p.m. to 5:50 p.m.)

20 THE COURT: Good evening.

21 MR. ROGOFF: Good evening, Your Honor.

22 THE COURT: Please be seated. So what news?

23 MR. ROGOFF: So without getting into the specifics of  
24 the motion or the specifics of the status of the discussions,  
25 there is one issue which I think it would be useful just to

1 apprise Your Honor of which I think gives some direction to how  
2 readily or quickly this can get resolved. And that concerns  
3 the fact that the committee is appointed as the official equity  
4 committee with respect to Genco Shipping & Trading Limited,  
5 which is the parent company, although it does have some  
6 operations and some specific assets. The majority of the  
7 assets, as I think Your Honor knows, are with the various other  
8 entity debtors that are the vessel-owning entities. And if  
9 Your Honor recalls the capital structure, Genco Shipping &  
10 Trading is the only public company. It's the company on whose  
11 behalf the equity committee was appointed. It also happens to  
12 be the entity that issued the bonds which are not guaranteed by  
13 any of the other SPEs.

14 The sticking point -- or at least one of the key  
15 sticking points that we have is the request that a transaction  
16 that would trigger a payment to Rothschild be a transaction  
17 other than solely with respect to Genco Shipping & Trading.  
18 And so, for example, if there were to be a sale of vessel  
19 assets by the other entities, whether or not that should be a  
20 transaction with respect to Genco Shipping & Trading that earns  
21 Rothschild a fee.

22 THE COURT: All right.

23 MR. ROGOFF: We have indicated that we would be  
24 prepared to consent to a fee, assuming the economics of a deal  
25 and the rest of the terms are acceptable to us, so long as

GENCO SHIPPING & TRADING LIMITED, ET AL.

74

1 there is a Chapter 11 plan that is confirmed for Genco Shipping  
2 & Trading, but that a transaction would not be triggered solely  
3 off of a transaction for any of the other asset-owning  
4 entities, the subsidiaries, the other debtors, and as Your  
5 Honor knows, these are not substantively consolidated estates.  
6 And I think that is where we seem to be hitting a hurdle that  
7 needs to be addressed which is, under what circumstances, as to  
8 which entity, the committee would be entitled to have its  
9 financial advisor fees paid from insofar as a transaction.

10 THE COURT: All right. Mr. Burke.

11 MR. BURKE: Thank you, Your Honor. Again, Michael  
12 Burke, proposed counsel for the equity committee, Your Honor,  
13 and thank you.

14 We took heed of what you said yesterday, and I will  
15 just repeat very briefly what the terms of our oral motion are.

16 THE COURT: No, I got it. I just want to hear  
17 what's --

18 MR. BURKE: Certainly.

19 THE COURT: -- given the hour.

20 MR. BURKE: The way that we have viewed this  
21 restructuring fee is, if there is a 2.2 million dollar  
22 restructuring fee, if there is a plan of reorganization that  
23 improves recovery to holders of equity, that would be the best-  
24 case scenario, 2.25. Now, mind you, we understand that we are  
25 an equity committee of Genco and we're seeking recovery from

GENCO SHIPPING & TRADING LIMITED, ET AL.

75

1 the Genco estate. The lower tier, if you will, Your Honor, is  
2 1.35. Now --

3 THE COURT: I understand, but what -- why is tie --  
4 not tying to Genco, from your point of view, and Genco only  
5 problematic, if you're the equity committee of the parent?

6 MR. BURKE: Well, I think we are tying it in the sense  
7 that we know we can only seek recovery from Genco. We are just  
8 seeking on the 1.35. Is that your question, Your Honor, on the  
9 1.35?

10 THE COURT: Well, let me understand that the -- I  
11 thought the comment was about the higher fee, was about the  
12 transaction fee and when that would be triggered and what this  
13 transaction would be in terms of an improvement.

14 MR. ROGOFF: I think to gel the issue, Your Honor, the  
15 argument or the approach that they're taking is that the fee of  
16 1.35, that completion fee, which is not triggered to an  
17 enhanced recovery for equity.

18 THE COURT: Right.

19 MR. ROGOFF: That's a separate concept --

20 THE COURT: Yes.

21 MR. ROGOFF: -- but that the 1.35 million dollar fee  
22 would be payable by Genco, I'm not sure from what resources, if  
23 there's only a transaction, however, with respect to the  
24 subsidiary. So, for example, if the prepack plan were not to  
25 be confirmed and as a result the various vessel-owning entities

1 were to start selling off their assets either in a single  
2 transaction or in multiple transactions, Rothschild would take  
3 the view, under their proposed engagement letter, that that is  
4 a transaction that then triggers a right to payment from Genco  
5 and whatever other assets Genco may have in its own right. And  
6 our position --

7 THE COURT: When you say a payment, you mean the  
8 1.3 --

9 MR. ROGOFF: The 1.35. Basically, they're viewing it  
10 as a guaranteed fee to them together with the monthly fee  
11 irrespective of not only a Chapter 11 plan not being confirmed  
12 for Genco but irrespective of the fact that a transaction is  
13 one only for the vessel-owning entities or the other subsidiary  
14 entities.

15 THE COURT: Well, before we get any further into this,  
16 this is the subject of negotiation. I mean, we're starting to  
17 get into what people are willing to do and not willing to do.  
18 And you either work it out or I'm just going to take the  
19 parties' last positions for purposes of the motion, and I'm  
20 just going to tell you what the result is, whatever that is,  
21 and everybody caveat emptor. So -- because what I understand  
22 you're talking about is the circumstances under which the 1.35  
23 is going to be paid or not paid and the certainty under which  
24 that happens or doesn't happen, which is really part of the  
25 negotiation.

1           So if I weigh in, essentially I'm giving you a ruling,  
2 and my thought is that you either are going to reach an  
3 agreement or I'm going to rule. So as much as I'd like to help  
4 you, I think I can't give you sort of a half a loaf on it,  
5 meaning that if you reach an agreement, which I strongly urge  
6 you to do, that you reach an agreement. But if you don't, then  
7 you don't, because this is a substantive point, and I know I'm  
8 trying to make a comment to ram that agreement down somebody's  
9 throat or not.

10           All I can say, as an objection, I think what I hear  
11 Mr. Rogoff saying is that they're looking for some triggering  
12 event for the 1.35 other than just simply providing a report.  
13 And again, if you work this out consensually, I don't really  
14 have to, in my view -- if it's outrageous, I won't approve it,  
15 but subject to being in generally reasonable light, I will.

16           I don't know what the halfway -- he is essential I  
17 saying, I think, that the 1.35's got to be essentially  
18 guaranteed because otherwise they're working for not enough.  
19 Again, the halfway point or whatever it is or what's  
20 appropriate for that is really is subject of negotiation,  
21 because I can't -- at that point I'm making a ruling about what  
22 the renewed motion is, as to whether it's permissible under the  
23 code or not, consistent with my prior ruling.

24           So, I mean, I'm happy to hear -- if you think there's  
25 some discrete thing that I can address --

GENCO SHIPPING & TRADING LIMITED, ET AL.

78

1 MR. BURKE: No.

2 THE COURT: -- but I'm just afraid I can't really,  
3 without short of ruling --

4 MR. BURKE: Your Honor, perhaps maybe the easiest way  
5 to handle it at this point, since we're probably reaching --  
6 I'm not saying we're there yet, but I think we're soon reaching  
7 the end of the utility of saying here is I think we can come  
8 back, we'll take a break, we'll see if we can resolve it, and  
9 if not, I think the estate would be happy to put on the record  
10 its response and what it would be prepared to agree with or not  
11 object to in terms of the oral application. And as Your Honor  
12 said, you can hear what Rothschild has asked for, you can hear  
13 what the estate's position is, and ultimately Your Honor can  
14 make a ruling. I mean, we'd like to avoid that, we'd like to  
15 have a consensus, but at some point in time, we need to have  
16 some parameters.

17 THE COURT: Right.

18 MR. KHALIL: Your Honor, may I please?

19 THE COURT: Yes.

20 MR. KHALIL: Your Honor, based upon, I think, your  
21 guidance, I'm not going to respond to the various points of Mr.  
22 Rogoff. Needless to say, I think he's incorrect. And I take a  
23 little umbrage in --

24 THE COURT: Well, it's 6 o'clock --

25 MR. KHALIL: Understood, but based upon your --

GENCO SHIPPING & TRADING LIMITED, ET AL.

79

1 THE COURT: -- so we've plenty of time to spend  
2 together where we all can take umbrage any time.

3 MR. KHALIL: Okay.

4 THE COURT: So --

5 MR. KHALIL: What do you suggest, Your Honor?

6 THE COURT: My suggestion is you -- either you bang  
7 heads one last time, you either reach an agreement or you come  
8 back, say whatever it is you want to say for purposes of the  
9 motion, and I'll make a ruling tomorrow. It's, I submit,  
10 ridiculous, but that's what I'll do. And everybody has to take  
11 the risks of whatever I'm going to rule as what they are. So  
12 it's really the only thing I can probably offer at this point.  
13 But I want to get it done quickly. We've spent enough time on  
14 this that I think that's probably the only thing that  
15 everybody's in agreement upon, that it's just not going to --  
16 if it's not going to get my better, I'll just rule.

17 So is there anything, before you go back and bang  
18 heads one last time, that anybody wants to discuss?

19 MR. KHALIL: I'd like to just -- I think that we have  
20 a very discrete issue, and the issue is really -- they actually  
21 have something much broader on the 1.35 than an expert report.  
22 It's confirmation of a plan of their entity, Genco Shipping &  
23 Trading. So if there's a plan confirmed at that entity, any  
24 plan is confirmed, they get 1.35. If a plan is confirmed at  
25 that entity with a material improvement to -- recoveries to



GENCO SHIPPING & TRADING LIMITED, ET AL.

80

1 equity holders, they get the 2.25. The question -- the  
2 discrete question is whether they get a 1.35 if there isn't a  
3 plan confirmed at the entity but there are some vessel that is  
4 are being sold at some of the subsidiaries where they don't  
5 have claims. They stand behind the secured lenders and the  
6 bondholders in that circumstance. That universe only comes up  
7 in a situation with this RSA fails, no plan is confirmed at  
8 their entity, and we're now selling off vessels because we've  
9 delayed.

10 THE COURT: No, I understand.

11 MR. KHALIL: I just wanted to make sure that that's --

12 THE COURT: I understand. Again, I think they're  
13 trying to search for a way to get a guaranteed payment of 1.35  
14 as part of, essentially, the compensation for doing work in the  
15 case, and folks are -- the other side are looking for some sort  
16 of trigger that's more than simply providing an expert report  
17 and it has something else to it.

18 And again, you can either negotiate that or I'll just  
19 make a ruling, because again, if I rule on that point, then I  
20 think that's sort of the crux of what the parties' legal  
21 differences are. So if I do that, I'm just ruling. So at a  
22 certain point very, very soon, that's going to be the only  
23 appropriate thing to do, for better or for worse.

24 So in light of that, how much time is appropriate? I  
25 don't know how sick of each other you all are and whether it

1 makes sense to say twenty minutes.

2 MR. KHALIL: Thirty minutes, Your Honor.

3 THE COURT: All right, thirty minutes. And what I'm  
4 going to do is I'm going to let this very nice lady go home,  
5 figuring that if you actually do reach an agreement today, it  
6 would be sufficient for purposes of everyone's -- you come in,  
7 you tell me, it will be on the record but not recorded. So I  
8 just made up a category; I don't know if it's accurate or not.  
9 But we've just made one. So she can go about her life. Well,  
10 she's been very gracious in agreeing to stay, but I'm giving  
11 her an out in case she actually has to go.

12 So anyhow, I will see you all back here at 6:30, and  
13 if you don't reach an agreement, I'll ask anybody to make any  
14 other statements in terms of what you're prepared to do so that  
15 I can have the narrowest dispute in front of me. And then what  
16 we'll do is adjourn at that point, and I will tell you a time  
17 when I'm going to make a ruling. All right.

18 IN UNISON: Thank you, Your Honor.

19 THE COURT: Thank you very much.

20 (Recess from 6:03 p.m. until 6:33 p.m.)

21 THE COURT: On the record. All right. So I was  
22 provided with a copy, a markup of what -- well, there will be  
23 no agreement. I was given a markup of a one-page thing as to  
24 what the committee proposed -- amended, it would be what the  
25 debtors -- presumably the RSA parties are willing to do. And

GENCO SHIPPING & TRADING LIMITED, ET AL.

82

1 so it narrows the scope of the dispute from previously to what  
2 I have in front of me. So I assume you're well aware of what  
3 they want to do.

4 MR. BURKE: I'm not exactly sure, Your Honor, actually  
5 what they --

6 MR. ROGOFF: Let me just -- if I may, Your Honor --

7 THE COURT: Sure.

8 MR. ROGOFF: -- for the record and for the benefit of  
9 Mr. Burke, what we took was the document that we sent to you  
10 earlier today in terms of our proposal. There's only one copy.  
11 But we also added in -- and again, we'll get to this on the  
12 record. We added in the fact that an additional trigger for  
13 the 1.3 million dollar fee would be in the absence of a prepack  
14 plan transaction would be any Chapter 11 plan that is confirmed  
15 for Genco would also trigger a right to payment of the 1.3  
16 million dollar fee. We made the clarification with respect to  
17 August 1st as when the crediting starts. In all other  
18 respects, the document is the same as what we e-mailed to you.

19 And then we provided the Court with our markup of the  
20 engagement letter which is consistent with the markup that we  
21 had previously shared with you, the only change being that we  
22 removed the reference to the 75,000 dollars in expenses. And  
23 I'll address before Your Honor later that the expenses are  
24 always subject to court review. And we clarified one of the  
25 requests on the scope of the indemnity that you had requested

1 in terms of setting the language that we deleted but just  
2 changing it from a substantial right to a material right. In  
3 all other respects, the document is consistent with what we  
4 sent you.

5 THE COURT: So a couple things. One is, after you  
6 leave here, I'd ask that you make a copy of this and send it to  
7 the equity committee and anybody else who wants to see it so it  
8 conditions the 1.35 million dollar deal on the payment on a  
9 consummation of a plan.

10 MR. ROGOFF: That is correct, Your Honor.

11 THE COURT: All right.

12 MR. BURKE: Your Honor, if I may?

13 THE COURT: Yes.

14 MR. BURKE: Thank you. Quite literally, I think what  
15 he -- Mr. Rogoff has shown you has obviously reflected all of  
16 the efforts that the parties have undertaken over the course of  
17 the past two days.

18 With that point, I think the issue is very narrow. You  
19 can see that all -- the equity committee as well as Rothschild,  
20 the debtors and the supporting creditors have moved a  
21 considerable amount, and there is essentially one issue  
22 outstanding. It is the 1.35. And I just want to talk briefly  
23 about that 1.35, and I think what Mr. Rogoff has provided you  
24 with is that Rothschild delivers an expert report to the  
25 committee -- I'm sorry -- delivers the expert report and that

1 there is a plan or a transaction.

2 Now, it is true that if there is a plan, whether it's  
3 the prepack plan or another plan, Rothschild would be entitled  
4 to the 1.35 as a guaranteed amount. I think the issue  
5 specifically that we'd like to present, Your Honor, is the  
6 debtor does have control over certain elements of the plan. We  
7 know that there's a restructuring support agreement, but, for  
8 example, it would be a very perverse incentive that if the  
9 equity committee were to prevail and, Your Honor, I would  
10 submit, needs to see an expert valuation report in order to vet  
11 the plan, in order to test if valuation is correct, but it  
12 could present a scenario, if it's contingent on a plan of only  
13 Genco, that another plan of reorganization could be developed  
14 where Genco is not involved, where it's just the subsidiaries  
15 of Genco or --

16 THE COURT: I see where you're going with that, but  
17 maybe one way to do this is something that's implicit but to  
18 make it explicit, some language about good faith in arriving at  
19 such a plan, which basically, I think, memorializes, for  
20 purposes of the agreement, that no one's being clever in  
21 crafting a plan that, for all practical purposes, resolves  
22 everything but somehow magically doesn't have Genco involved in  
23 it, and maybe that gives you -- because one thing I notice  
24 that's not in here is any sort of timing requirement; it's  
25 really for the case. So I think that that solves some concerns

1 that way, but maybe if you draft some good faith language, that  
2 might -- you might be able to give your client some comfort  
3 that no one's going to try to out-clever you so as to make this  
4 fee go away. And certainly, you could also say, to the extent  
5 that that good faith backs a question, that it ends up in front  
6 of me, and I'll be more than familiar with what's gone on in  
7 the cases. And if it looks odd, we'll apply the walks like a  
8 duck, talks like a duck test to see whether there's something  
9 that is -- seems to be improper about it.

10 I mean, now I'm doing what I thought I couldn't do  
11 before, but that occurs to me as a possible way to bridge some  
12 of the gap, if that's what you're concerns about.

13 MR. BURKE: Your Honor, that is partially what we're  
14 concerned about. Another point I'd like to address is, similar  
15 to -- in addition to providing the expert report, there would  
16 be a plan or a transaction, that necessarily doesn't include  
17 that they have to artificially cut us out of a Chapter 11 plan;  
18 however, there would also be a situation where there could be  
19 assets sold, and I take a little bit of comment when you look  
20 at the definition of "transaction" just talking about selling  
21 off a ship could trigger a transaction fee for Rothschild.  
22 That's not what they're looking for. Obviously, transaction,  
23 there's got to be some materiality to it. Also --

24 THE COURT: Yeah, but that too, I think, might be a  
25 language fix. All or substantially all of the assets -- I

1 mean, there's a way to address that if you -- again, I'm not  
2 sure what the arguments are in the conference rooms, but that  
3 would seem to be a drafting problem. Again, I --

4 MR. BURKE: No, these are excellent suggestions, Your  
5 Honor.

6 THE COURT: I'm just throwing these things out to the  
7 extent that I'm here and you're here, and hopefully, we get  
8 somewhere, but if we don't, we certainly will tomorrow.

9 All right. Anything else that you can think of that's  
10 a concern that we might potentially address?

11 MR. BURKE: Well, actually, at this point, Your Honor,  
12 we believe that the transaction fee that -- again, the  
13 structure that it is, the expert report, the -- whether a plan  
14 is confirmed, or there is a transaction that involves  
15 substantially all the assets or substantially all of the debt  
16 restructured, which could happen about Genco being involved,  
17 and we appreciate Your Honor's good faith drafting issues. I  
18 mean, there will always have to be an objective standard to  
19 take a look at this, but perhaps, thinking off the cuff, and  
20 obviously I'd need to confer with Mr. Hahn, but it certainly  
21 seems that we wouldn't need to get into the issue of and bring  
22 in front of Your Honor if the equity committee is successful in  
23 proving that value is more than what the debtor says and not  
24 tee up for another day the issue of are they acting in good  
25 faith with a subsequent plan or subsequent transaction. This

1 is not meant to simply just earn a fee because there is not a  
2 material transaction. It's really, if there's a material  
3 transaction as a result of Rothschild's efforts in proving that  
4 value is higher, so they shouldn't be penalized for that.

5 THE COURT: No, understand that. I understand that,  
6 and I suppose that's another way that you could look at  
7 drafting which is to say if it's determined that value is --  
8 essentially that you prevail on your confirmation objection.  
9 But again, me getting involved in spit-balling ideas is a  
10 slippery slope, and I also think it's an only limited utility.  
11 There are a lot of really smart people in this room who've  
12 probably thought and rethought of issues and ways around this,  
13 and so I'm throwing things out. I may hit the mark. I may be  
14 wildly off the mark. So I don't hold any illusions that way.

15 So I think you have what you have, and what I will do  
16 is schedule something tomorrow to issue a ruling on this if you  
17 don't find some other way to resolve it between now and then.

18 MR. ROGOFF: All right. If I may, Your Honor, before  
19 we conclude, I would like to, at least for purposes of the  
20 record, respond to some of the comments that were made and  
21 elaborate upon what the debtors' position would be upon which  
22 they wouldn't object.

23 THE COURT: All right. Let me -- in the interest of  
24 hearing from everybody on one side, which I've been trying to  
25 do, let me hear from Mr. Hahn who's on the same side of the



1 issue.

2 MR. HAHN: Thank you, Your Honor. I think  
3 realistically, further efforts of crafting language are not  
4 going to succeed, and we've spent the better part of two days  
5 at that, and everyone, I'm sure, has their own and different  
6 views on who's at fault on that, but we are where we are.

7 I just want to make a couple of things hopefully clear  
8 about where Rothschild is on this. One, this is not about who  
9 pays for the fees. The debtors have asked and Rothschild has  
10 agreed that the counterparty to the letter will just be Genco,  
11 is purely about what triggers the fee. And particularly in the  
12 event where Rothschild has done -- provided the services that  
13 it was contracted to provide in order -- in connection with the  
14 contested hearing, it's delivered it expert report, which we  
15 thought perhaps -- and you don't view it as sufficient -- as a  
16 response to your view that the Rothschild people shouldn't get  
17 a fee for just showing up, but they had to contribute to the  
18 process.

19 For better or worse, delivery of that report really is  
20 a necessary step towards the confirmation hearing, which the  
21 debtor wants to have happen. So it is actually a material  
22 contribution of the process, not different in many ways from  
23 the fairness opinion is that investment bankers deliver an M&A  
24 transaction to allow the approval and consummation of those  
25 transactions.

1           Rothschild is loath to narrow the triggering event,  
2           which the second element of the triggering event because they  
3           have to deliver the report, namely the transaction, in ways  
4           that it has no control over. And it's not because we have any  
5           concerns about the bad faith of Mr. Rogoff or the other  
6           purchase incidents were quite sure that they would not be  
7           proposing plans that they didn't think complied with the  
8           requirements of the code.

9           But the case can take a course where they conclude  
10          that those transactions quite -- those requirements can or  
11          should be met by a transaction that doesn't involve Genco,  
12          notwithstanding the fact that Rothschild has provided all the  
13          services it's contracted to provide, it has delivered it  
14          report, and perhaps its report has persuaded Your Honor that  
15          there -- that the plan should not be confirmed. That might  
16          actually be what triggers the alternative transaction.

17          They don't want to be in a position, since they don't  
18          control the course of these cases, where the result -- and I  
19          was saying they're doing everything that they were contracted  
20          to do, is that the -- because of a structural quirk, frankly,  
21          in the transaction, they don't get paid.

22                 THE COURT: All right.

23                 MR. HAHN: Thank you, Your Honor.

24                 MR. ROGOFF: So to sort of focus on the narrow part of  
25          the issue, first of all, just to remind the Court, Genco -- and

1 by Genco, Genco Shipping & Trading, the parent company, is also  
2 where the bonds lie. It's also where, for example, Jefferies'  
3 fee would be paid. It's where the other fees to which Genco  
4 has contractually obligated itself to be paid lie. And it's  
5 important because it's where the equity committee exists at the  
6 parent level.

7 It's not simply a function of what triggers the  
8 payment -- and let me back up a second. Your Honor will note  
9 from the hand markup that I provided to the Court is that the  
10 company with the consent of the RSA parties that objected  
11 yesterday actually moved quite materially from what the  
12 original proposal that we gave was. The original proposal,  
13 taking into account yesterday's discussion, is that there had  
14 to be some additional value created for Rothschild to receive a  
15 fee was we had bifurcated the fee into two tiers. One was  
16 assume no new value was created but the plan is confirmed, and  
17 that would be what we agreed to as a part of a resolution would  
18 be the 1.35 million dollar completion fee, and the second would  
19 be the higher fee, the 2.25 million dollar in the event that  
20 the improvement -- for equity, there's a material improvement.

21 And then during the course of today, the request was  
22 made which the creditors agreed to and the companies agreed to,  
23 that so long as any Chapter 11 plan for Genco is confirmed --  
24 and it's not just a payment issue; it's also a trigger issue.  
25 As long as any Chapter 11 plan for Genco is confirmed,

1 including a plan of liquidation for Genco Shipping & Trading,  
2 that we would agree that that would be also earn the sort of  
3 minimum fee, the 1.3 million dollar fee. I know there's been a  
4 reference to guarantee. It's not that it's guaranteed because  
5 it's not backstopped by any of the other entities, but it would  
6 be -- the trigger would be satisfied.

7 So what we're talking about as a result, Your Honor,  
8 is a scenario not in which is transaction is structured in an  
9 effort not to confirm a plan for Genco because we have other  
10 creditors that we would like to be able to confirm a plan for  
11 Genco, even if it's only a plan of liquidation, but that the  
12 estate is unable to confirm a plan and ultimately would go into  
13 a Chapter 7 proceeding or the case were to be dismissed.

14 And it is in that narrow context that where we have  
15 said is all right, Rothschild, we'll agree to the 1.3 million  
16 dollar fee that would be triggered and payable even if you are  
17 successful in prosecuting the confirmation objection, as a  
18 result we can confirm the plan, as a result the RSA is  
19 terminated, we need to then pursue other, since we still have  
20 other estates and creditors, another transaction which could  
21 include the sale of assets. And at the end of the day, the  
22 assets left in the Genco Shipping & Trading estate itself, and  
23 it does have some of its own assets in addition to the equity  
24 of its subsidiaries, but in the event that those assets that  
25 are left are not sufficient for us to confirm even a

1 liquidating Chapter 11 plan.

2 So what we've moved away from, what the estate has  
3 moved towards, Rothschild, in trying to allow the committee to  
4 retain its professional, is we've moved away from value  
5 creation to actually a value-destructive proposition --

6 THE COURT: All right.

7 MR. ROGOFF: -- because we're left with the inability  
8 to confirm a plan.

9 THE COURT: All right, well, let me make one last shot  
10 here to add any value myself, which is, I see your point that  
11 you're trying to set what you think is a low hurdle for getting  
12 this fee, that is, any plan, including a plan of liquidation by  
13 Genco. What I hear on the other side saying is that, well,  
14 that wouldn't be fair if, in fact, we prevailed in our  
15 confirmation objection about value. So isn't there a way that  
16 this can be an either/or, that it's your condition, or if the  
17 committee has prevailed in its objection to confirmation about  
18 the value --

19 MR. ROGOFF: The problem, I think, with that, Your  
20 Honor -- I appreciate the suggestion -- the problem, I think,  
21 is simply determining that the debtors' plan is not  
22 confirmable, unless we're ultimately able --

23 THE COURT: No, it would be more narrow than that; it  
24 would have to be tied to value because if they're providing  
25 evidence of value, then they will have shown, for purposes of

1 the estate, that there's a problem with value, and so you  
2 wouldn't -- the idea would be let's not penalize them for  
3 having been successful.

4 MR. ROGOFF: But the problem is, we've been penalized  
5 because they've been successful unless value -- unless that  
6 determination actually results in something occurring that  
7 allows the plan to be confirmed. So for example --

8 THE COURT: Well, no, I understand you, but at that  
9 point, if they're right, then people try to put Humpty Dumpty  
10 back together again whatever way is appropriate under the Code  
11 and considering everybody's interests. But you could -- it  
12 would be hard to blame somebody for, at that point, prosecuting  
13 an objection and having been successful.

14 MR. ROGOFF: Except, Your Honor, in that instance,  
15 however, and it really goes -- I think, Your Honor pointed out,  
16 we set a very, very low threshold here, which is just a plan is  
17 confirmed.

18 THE COURT: No, I understand that.

19 MR. ROGOFF: And we haven't set a time deadline. And  
20 so I think what we're struggling with is, so if Your Honor were  
21 to determine not to confirm the plan, and it's not confirmed,  
22 we have to do something. We either have to do a sale  
23 transaction, we have to go back to the drawing board and  
24 confirm a plan, and ultimately, even a sale transaction has to  
25 result in a liquidating plan. And if we can't at least get

1 that basic level of a trigger, which is a Chapter 11 plan is  
2 confirmed for Genco, they may have succeeded by putting in  
3 their expert report, but the estate has not been befitted  
4 because we're talking about a scenario in which we can't even  
5 confirm a plan. And I think at the end of the day, certainly  
6 from our perspective at the 1.35 million dollar fee that we  
7 have agreed, under this context, phrasing it a different way  
8 is, is at that level fee, there needs to be a plan that's  
9 confirmed. We didn't stage this to say you get X dollars just  
10 for submitting your report, even if you blow up the case and we  
11 can't confirm a case for Genco.

12 THE COURT: No, I understand you're trying to -- some  
13 of the subtext here is to set up something where no one's  
14 incentivized to act in a way that's unreasonable. I get it. I  
15 don't know if that means that there are three tiers and one is  
16 one way and another has to do with the confirmation objection.  
17 I don't know the answer. Again, I'm throwing out ideas; they  
18 may be of some utility, they may be of none. But --

19 MR. ROGOFF: We certainly didn't, Your Honor, discuss  
20 a lower tier simply for putting in the expert report and  
21 prevailing on valuation.

22 THE COURT: All right.

23 MR. ROGOFF: We tried to work with their request --

24 THE COURT: Right.

25 MR. ROGOFF: -- at the 1.35 million dollar fee, and

GENCO SHIPPING & TRADING LIMITED, ET AL.

95

1 that, we felt, a baseline has to be that we can confirm a plan.  
2 Not even just the pre-pack plan, but a plan. But Your Honor,  
3 fair point that we did not go back and say, for a much lower  
4 threshold, is there some amount.

5 THE COURT: No, I'm not suggesting that would fly,  
6 anyway. But -- and again, at a certain point, I think we're  
7 talking in circles. So when we're done here, we're done here,  
8 and I'll just rule.

9 So anything else anybody else wants to say?

10 MR. KHALIL: Your Honor, very briefly; I don't have  
11 much to add to Mr. Rogoff's comments, but -- forgive me if I'm  
12 redundant in any way -- there are really three options for  
13 Genco Shipping & Trading: it's either confirmed plan,  
14 dismissed, or liquidated. So if we're in dismissed or  
15 liquidated zone, that's what we're worried about. We're trying  
16 to do exactly what Your Honor said. We're trying to avoid an  
17 incentive to destroy value.

18 The other issue we're concerned with is a defined  
19 concept like "substantially all". What does that exactly mean  
20 if we sell a dozen ships and they get their 1.3. So that's  
21 what we're trying to avoid. So what we did try to do was  
22 create a construct that protects them in all circumstances that  
23 are reasonable and not value destructive or would result in a  
24 windfall or gamesmanship. If any plan gets confirmed, they get  
25 paid. I'm sure if they win on valuation, there's going to be



1 another plan that provides an enhanced recovery. It's hard to  
2 imagine that they win on valuation and we end up with that  
3 debtor being dismissed or that debtor liquidating in a Chapter  
4 7.

5 So I'm not sure what the ghost is that they're solving  
6 for. It's hard to see. And I think all of the suggestions  
7 that Your Honor is making and why they aren't solving the  
8 problem is because it's hard to see exactly what the problem is  
9 because if they win on confirmation -- there's going to be a  
10 confirmed plan that provides them with --

11 THE COURT: Well, didn't OSG, when there was an  
12 argument about valuation, and I know equity was involved in  
13 transaction, but wasn't there a rights offering when people  
14 thought there was more value? I mean, that rights offering, I  
15 assume, is pursuant to a plan.

16 MR. KHALIL: It was pursuant to a plan, Your Honor.  
17 So it always ends up -- again, the --

18 THE COURT: I will say, I do have trouble imagining  
19 that if there is a -- if the committee prevails in its  
20 objection about valuation that the case is going to be  
21 dismissed or go to Chapter 7 --

22 MR. KHALIL: It's almost impossible to --

23 THE COURT: -- because that would -- I mean, I don't  
24 know what that would look like.

25 MR. KHALIL: The only scenario where that would be

1 possible is, and I think it's already solved by the Code, is a  
2 situation where the debtors have decided to sell off all of the  
3 assets of the subsidiaries pursuant to a plan, and then  
4 affirmatively dismiss the cases at Genco Shipping & Trading; it  
5 would be war with the bondholders if they did that. What would  
6 they do with all of the assets? They wouldn't get their  
7 releases for their board members. It's just not going to  
8 happen. And I'm sure, Your Honor, the equity committee would  
9 come march in to court and say none of the subsidiaries' plans  
10 are proposed in good faith because they're specifically  
11 designed to deprive me of my one-million-dollar fee.

12 THE COURT: Yeah, in a case that's worth over a  
13 billion dollars, I can't imagine that there would be such  
14 pretzel-like machinations to avoid the payment of a one-  
15 million-dollar fee.

16 MR. KHALIL: Exactly. And that's why our -- just our  
17 very limited -- we think that the construct works as is; it  
18 avoids that incentive to be value destructive, and --

19 THE COURT: Do you have any objection -- and  
20 theoretically, I do -- to language about good faith?

21 MR. KHALIL: Not at all, Your Honor, because again, I  
22 believe that already exists in 1129(a).

23 THE COURT: Well, I think it does.

24 MR. KHALIL: Yeah.

25 THE COURT: All right. Well, yeah, 1129, a plan has

GENCO SHIPPING & TRADING LIMITED, ET AL.

98

1 to be in good faith, but the idea is the absence of a plan, to  
2 make it explicit that it can't be done for purposes of avoiding  
3 a million-dollar fee. But again, if the values are either what  
4 the estate says or a higher value, then I would say a million  
5 dollars is a drop in the bucket. But it's certainly not going  
6 to be the driver for everything else that goes on.

7 MR. KHALIL: I couldn't agree more.

8 THE COURT: All right.

9 MR. KHALIL: Thank you, Your Honor.

10 THE COURT: All right, last shot.

11 MR. BURKE: Very briefly; last comment.

12 THE COURT: And then we're going to mercifully pull  
13 the plug on this for all concerned.

14 MR. BURKE: Your Honor has quite clearly identified  
15 the issue and there's been a lot of talk about value  
16 destruction and what have you, and Your Honor's also talked  
17 about tied to results. I just submit that it would, again, be  
18 a perverse result that if the equity committee, with  
19 Rothschild's assistance with the valuation report, were to  
20 determine that the plan -- the valuation was higher and the  
21 plan could not be confirmed, that another plan could be  
22 constructed. And very importantly, you talk about good faith  
23 under 1129, well, if they don't include, notwithstanding all of  
24 these assurances that have been discussed of how that  
25 practically can't work, it could happen.

GENCO SHIPPING & TRADING LIMITED, ET AL.

99

1 THE COURT: But do you really think that a one-million  
2 dollar fee is going to be the driver if the valuation's found  
3 to be north of what's in this RSA?

4 MR. BURKE: It's not --

5 THE COURT: I mean, that somebody would say I've got a  
6 lot of fish to fry, irons in the fire, whatever metaphor you  
7 want, but I'm going to let this one-million-dollar fee drive  
8 the case after the trial and the finding that there's been a  
9 valuation of the RSA plus, I just -- and again, that's why I  
10 say, if you add some sort of good-faith component, that you  
11 can't essentially decide to go down a path that doesn't involve  
12 a Genco plan and that you look at that for a good-faith  
13 inquiry. But I just -- I mean, it's a bit of belt and  
14 suspenders in the sense that why would someone, for a million  
15 dollars, jump through all these hoops.

16 So if I was -- when I mentioned the idea of you  
17 prevailing at the hearing on valuation, I was thinking, well,  
18 you want to make sure that if you do win, you don't end up  
19 holding a bag of rocks, to make the Charlie Brown analogy. But  
20 thinking about the economics of the case, I have trouble  
21 imagining how that would happen. So, I mean, that's --

22 MR. BURKE: I understand, Your Honor. There's two  
23 questions there: how could it really happen, and then the more  
24 important one is why should Rothschild be subject to that risk.  
25 Well, we can all talk about situations, but why should the

GENCO SHIPPING & TRADING LIMITED, ET AL.

100

1 party that is helpful in providing that there's more value be  
2 taking the risk that they may not receive their transaction  
3 fee. So it's really an economic question, but Rothschild  
4 shouldn't have to take that risk.

5 THE COURT: Well, I've got to say, I'm frustrated  
6 we're here. One of the reasons I do think we're here is  
7 because the original ask in the motion was really  
8 inappropriate. And I've got to say, I went back to double-  
9 check; there's not any discussion in the motion to justify the  
10 transaction fee. Zero. And you've got to have known that it  
11 was going to get heavy fire. So I just submit it was a really  
12 bad way to start the conversation, and if we had maybe started  
13 at a closer point, we'd be closing the deal now, rather than  
14 still fighting over where we are.

15 So be that as it may, I understand, I hear you.  
16 There's no agreement, and if parties find religion between now  
17 and tomorrow morning, they can let me know. If not, I will  
18 call -- chambers will call folks to just schedule a time to  
19 tell you what my decision is.

20 MR. BURKE: Thank you.

21 THE COURT: Which is probably a result nobody will  
22 want, but -- because I can tell you right now, sitting here I  
23 don't know what it is. So that's not a good situation for  
24 anybody because it's uncertainty, and uncertainty is really not  
25 helpful, I think, for any of the parties.

GENCO SHIPPING & TRADING LIMITED, ET AL.

101

1 MS. SCHULTZ: Your Honor, I'm sorry. Just for  
2 clarity. Do you want to do a telephonic decision tomorrow, or  
3 do you want us to come on down?

4 THE COURT: No, telephonic is fine because at that  
5 point, I don't think anybody wants to talk about these issues  
6 any further, and so we'll just do it on the phone and save  
7 everybody a trip on the subway and I'll just tell you what my  
8 ruling is.

9 MS. SCHULTZ: Thank you, Your Honor.

10 THE COURT: I'd like to give you a time now, but I  
11 confess, I'm not sure. If anybody has an irreconcilable  
12 conflict tomorrow, let me know. Otherwise, it'll probably be  
13 some time in the early afternoon, say 2 or 3 o'clock because I  
14 know this really -- this has to get done. So if I can do it  
15 sooner than that, I may call you and tell you I'll do it sooner  
16 than that.

17 So thank you very much for your slog this evening. I  
18 appreciate your efforts to try to resolve this.

19 Oh, while we're here, on a completely different  
20 subject, happily, there was another request, and I think my law  
21 clerk mentioned it in the hallway, a retention for CMJ, which I  
22 think originally was going to be done on super-super short  
23 notice. I think it was filed Friday; it was going to be on for  
24 Monday and I said we can't get it on for Monday, which was  
25 probably, under all circumstances, a good thing. We need to

GENCO SHIPPING & TRADING LIMITED, ET AL.

102

1 get that on for a hearing, and so I think there was a  
2 suggestion of Friday for that. Is that -- that was --

3 MR. BIERMAN: That's our second expert. Is that fine?

4 THE COURT: Right.

5 MR. BURKE: We didn't file it on shortened notice,  
6 obviously --

7 THE COURT: Right.

8 MR. BURKE: -- so we just filed it. Friday would be  
9 fine with the committee.

10 THE COURT: Any --

11 MR. ROGOFF: Your Honor, this is the professional that  
12 we noted yesterday there was a disclosure, for the first time,  
13 in the retention application that a principal of that entity,  
14 and in fact, the individual who is working as their expert or  
15 providing them with guidance, has been asked to serve on a  
16 board of a competitor, Dry Bulk Shipper. The company is  
17 currently evaluating whether or not this rises to the level of  
18 a conflict such that we may need to respond in a way other than  
19 saying we have no objection. And so I would request that we be  
20 given more time since we need to diligence this information.  
21 Otherwise, we could go forward on Friday, but we're probably  
22 going to need to object to the engagement, which we're not  
23 looking to do.

24 THE COURT: How much time do you need to do your  
25 diligence?

1 MR. ROGOFF: I would need to speak with the client  
2 about it, Your Honor.

3 THE COURT: So this was filed I think Friday, right?

4 MR. BURKE: Correct, Your Honor.

5 THE COURT: So let's do this. Why don't you talk  
6 about an appropriate schedule in light of diligence. You  
7 obviously would prefer not to have an objection. It sounds  
8 like that's the issue, right? There's no other issue, such as  
9 this about compensation or --

10 MR. ROGOFF: No, Your Honor, we had had discussions  
11 with the equity committee about Mr. Arden's (ph.) involvement  
12 and about the retention. These issues had been brought up. We  
13 weren't planning on objecting, and then, as I said, it wasn't  
14 until we saw the application, we saw the disclosure of his  
15 involvement with a competitor that this gave rise to concern  
16 about his involvement.

17 MR. BURKE: Your Honor, I think this is scheduling.  
18 We can reserve argument until later.

19 THE COURT: All right, so let's do this. Try to work  
20 out an appropriate schedule for this so we get it done, I would  
21 imagine it would be early next week if it's not Friday. If you  
22 work it out, I don't see any reason that will be a problem.  
23 But we will need to address it so that it's done in time for  
24 everybody to do what they have to do.

25 MR. BIERMAN: Well, Your Honor, I'll just remind the



GENCO SHIPPING & TRADING LIMITED, ET AL.

104

1 Court that the expert reports are due next Wednesday. The  
2 notion of resolving the issue sometime --

3 THE COURT: I didn't make the application on Friday.

4 MR. BIERMAN: I understand, Your Honor. I understand,  
5 Your Honor.

6 THE COURT: So it's a good thing I didn't put it on  
7 for Monday; it would've been just another in a series of  
8 exciting, difficult, and ultimately problematic things that we  
9 dealt with. So that's a discrete issue; that's a factual  
10 issue. Either it's a problem that can be -- it's a problem; if  
11 it's a problem, it may be able to be worked around, maybe not.  
12 So what I'd ask is that folks exchange information and work the  
13 problem as quickly as possible. I'd like to talk about it on  
14 Friday to see if we have anything illuminating to discuss so if  
15 we can put it to bed faster than Monday, that's fine.

16 So why don't we do this in the hope springs eternal  
17 mode. I'd like to put it on for Friday. I'm going to allow  
18 you to make any oral statements you want to make. I'm also  
19 going to say that if you ask for more time at that point, I  
20 will adjourn it to some other time that we work out. But this  
21 way, if there is no objection, we can get it resolved on  
22 Friday. If you're still working on it, you're working on it,  
23 and that's fine.

24 MR. ROGOFF: That's fine. And just for clarity, I  
25 believe this is what Your Honor was getting towards. We would

GENCO SHIPPING & TRADING LIMITED, ET AL.

105

1 like to avoid having to file an objection --

2 THE COURT: Yeah.

3 MR. ROGOFF: -- if we can resolve the issues, so to  
4 the extent that we can resolve it consensually for Friday, it  
5 could be presented without objection.

6 THE COURT: Right.

7 MR. ROGOFF: If there is an objection, we can  
8 certainly share concerns with Your Honor at Friday's hearing,  
9 but we don't want to be constrained to have to file a written  
10 objection between now and Friday.

11 THE COURT: No, I don't want a written objection by  
12 Friday.

13 MR. ROGOFF: Thank you.

14 THE COURT: So I may need one Monday or Tuesday, but  
15 I -- it just -- I don't want to force anybody's hand to fight  
16 about something else.

17 MR. ROGOFF: Agreed.

18 THE COURT: We have enough things to fight about. All  
19 right.

20 MR. BURKE: We'll try to work it out with Mr. Rogoff.

21 THE COURT: If for some reason, religion finds anybody  
22 or everybody this evening, please shoot us an e-mail on the  
23 chamber's e-mail. I give you permission to do that just so I  
24 can stop thinking about it. But if not, we'll be in touch  
25 tomorrow.

GENCO SHIPPING & TRADING LIMITED, ET AL.

106

1 MR. BURKE: But I presume no letter briefs.

2 THE COURT: No letter briefs. No. Thank you very  
3 much for that reminder. Appreciate it.

4 IN UNISON: Thank you, Your Honor.

5 THE COURT: Thank you. Have a good evening.

6 (Whereupon these proceedings were concluded at 7:06 PM)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true  
and accurate record of the proceedings.



---

DENA PAGE

AAERT Certified Electronic Transcriber CET\*\*D 629

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: June 4, 2014